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# Functionality or Formalism - Partners and Shareholders as Employees under the Anti-Discrimination Laws

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# FUNCTIONALITY OR FORMALISM? PARTNERS AND SHAREHOLDERS AS “EMPLOYEES” UNDER THE ANTI-DISCRIMINATION LAWS

Ann C. McGinley\*

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## I. INTRODUCTION: THE HIDDEN FALLACY

IN *Clackamas Gastroenterology Associates P.C. v. Wells*,<sup>1</sup> the United States Supreme Court established the standards for determining whether a shareholder in a professional corporation ("PC") is an

1. 123 S. Ct. 1673 (2003).

“employee” as defined by Title I of the Americans with Disabilities Act of 1990 (“ADA”).<sup>2</sup> The Court concluded that the Equal Employment Opportunity Commission’s (“EEOC”) standards should govern the inquiry, with a focus on whether the PC exercises control or has the right to exercise control over the shareholder. The Supreme Court supported a “totality of the circumstances” test and an inquiry into various factors including:

- a) whether the organization can hire or fire the individual, set work rules, and supervise the individual’s work,
- b) whether and how much the individual can influence the organization;
- c) whether the parties intended an employment relationship; and
- d) whether the individual shares in the profits, losses and liabilities of the organization.<sup>3</sup>

*Clackamas* holds that the *function* of the individual within the enterprise, rather than the *form* of the organization or the title accorded the individual, should govern; thus partners of general and limited partnerships and shareholders, members, or directors of professional corporations should all be treated alike, using the same standards.<sup>4</sup>

*Clackamas* overturned the Ninth Circuit’s holding that the form of the organization should govern whether a physician-shareholder who practices medicine for a PC is an employee. Because the defendants had voluntarily adopted a corporate form and the shareholders had employment contracts with the corporation, the Ninth Circuit concluded that the individual physicians were “employees” under the ADA. The Ninth Circuit decision along with an earlier Second Circuit decision in *Hyland v. New Haven Radiology Associates, P.C.*,<sup>5</sup> created a split in the circuits, conflicting with *EEOC v. Dowd & Dowd, Ltd.*<sup>6</sup> In *Dowd & Dowd*, the Seventh Circuit held that the courts should take a functional approach, examining whether the shareholders of a PC were more like partners in a general partnership or more like employees. If they were more like partners, according to the Seventh Circuit, the individuals were “employers” and therefore could not be “employees” under the anti-discrimination laws.<sup>7</sup>

The result in *Clackamas* is not surprising because it adopts the EEOC guidelines and ostensibly advocates a functional rather than a formalist

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2. Title I of the ADA states in pertinent part:

(a) General rule.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

42 U.S.C. § 12,112(a) (2000).

3. *Clackamas*, 123 S. Ct. at 1679-80.

4. *Id.* at 1680-81.

5. 794 F.2d 793 (2d Cir. 1986).

6. 736 F.2d 1177 (7th Cir. 1984).

7. *Id.* at 1178; accord *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987).

approach. But *Clackamas* is nonetheless disappointing because the comparison of a shareholder's role to that of a partner relies on two central fallacious assumptions. First, it improperly assumes that bona fide partners in general partnerships who participate in the management of the organization and who share the profits and liabilities of the partnership cannot be "employees" for purposes of the anti-discrimination acts. Second, it assumes erroneously that an individual cannot simultaneously be an "employer" and an "employee" under the anti-discrimination acts.

If these assumptions are disproved, which I propose to do in this article, the theoretical foundation upon which *Clackamas* stands must fall and Congress should overrule *Clackamas* and establish a test for determining employee status that considers both the power of the individual within the partnership and the connection to the partnership.

Even if *Clackamas* is not overruled, the Court's decision in *Clackamas* gives little guidance to the lower courts in determining which partners are employees under the anti-discrimination laws. This vagueness leaves much discretion for decision making that may lead to inconsistent and erroneous results in the lower courts. In an attempt to avoid these errors and inconsistencies, this article will address the different possible interpretations of *Clackamas* and argue that it should be read to permit a close examination of the relationships within the partnership to decide which partners are employees. This reading should produce a result consistent with the language of the anti-discrimination acts that furthers its values and purposes.

Whichever route is taken—the outright overruling by the legislature of *Clackamas* or a liberal judicial interpretation of *Clackamas*—the standard for determining whether a partner is an employee should be twofold: 1) whether the individual wields insufficient power within the organization—economic, social, and/or political—to avoid discrimination; and 2) whether the individual is sufficiently connected to the organization to suffer the economic and dignitary harms resulting from discrimination. If the answer to both of these questions is "yes," the partner should be an "employee" under the anti-discrimination acts.<sup>8</sup>

The issue of whether partners and/or shareholders are "employees" under the anti-discrimination acts is extremely important to the interpretation and coverage of the law. It affects those partners and shareholders who work in large and small partnerships and PCS, granting or denying them the ability to sue the firm for race, color, sex, national origin, relig-

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8. The difference between overruling the opinion outright by legislative enactment and an interpretation that takes these factors into account is procedural. If Congress overrules the opinion, I propose that it establish a rebuttable presumption that a partner is an "employee" under the acts, subject to a defendant's proof by a preponderance of the evidence that the partner either has sufficient power to avoid discrimination or is sufficiently disconnected from the firm to suffer the harms of discrimination. For a full explanation of this proposal, see *infra* Part V.A. If Congress does not overturn the opinion, I argue that the courts would be free to use this test under *Clackamas*; however, consistent with previous law, the burden of proof would fall on the partner to establish both prongs of the test in order to be considered an employee. See *infra* Part V.B.

ious, age, or disability discrimination. It also affects partners in a limited liability partnership ("LLP")<sup>9</sup> and members of a limited liability company ("LLC").<sup>10</sup> It could conceivably affect the employees of a privately held corporation. Perhaps even more important, it also governs the application of the anti-discrimination acts to small firms whose employees cannot hold the company accountable for discrimination unless the partners or shareholders<sup>11</sup> of the enterprise are counted as "employees."<sup>12</sup>

Part II of this article explores a history of the complex coverage issues presented by the term "employee" under the ADA, Title VII of the 1964 Civil Rights Act,<sup>13</sup> and the Age Discrimination in Employment Act (ADEA).<sup>14</sup> Part III analyzes the legal precedent that addresses whether partners and shareholders are "employees" under the anti-discrimination acts. Furthermore, it evaluates the Supreme Court's reasoning in *Clacka-*

9. An LLP is a business form in which the partners do not assume personal liability for the obligations of the firm. See NEV. REV. STAT. 87.150(2) (2002); J. Dennis Hynes, *Foreword, LAW & CONTEMP. PROBS.*, Spring 1995, at 1, 3; see also Deborah A. DeMott, *Our Partners' Keepers? Agency Dimensions of Partnership Relationships*, LAW & CONTEMP. PROBS., Spring 1995, at 109, 123 (noting that the LLP may reduce incentives of partners to monitor behavior of employees and other partners).

10. An LLC is an entity that does business that is neither a corporation nor a partnership. The LLC provides limited liability for its owners, and it gets the benefits of a partnership for taxation purposes. See Hynes, *supra* note 9. See generally Wayne M. Gazur, *The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role*, LAW & CONTEMP. PROBS., Spring, 1995, at 135.

11. In order to avoid repetition, I use the terms "partners" and "shareholders" to include all partners who work for a general or limited liability partnership, shareholders in a professional corporation who actively practice their profession as part of the business as well as members of a limited liability company.

12. All of the federal anti-discrimination laws set a minimum number of "employees" a company must have in order to be considered a covered "employer" by the statute. See *infra* notes 18-20 and accompanying text.

13. Title VII, in its relevant part, states:

(a) It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

14. The ADEA states in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (2000).

*mas*, demonstrating that the decision depends on the faulty concept that an employer can never be an "employee" under the anti-discrimination statutes. Part IV offers a more sustained analysis of *Clackamas*, demonstrating the opinion's failure to address the issues of economic and social power, dependence and connectedness of partners who are vulnerable to discrimination, and the resulting economic and dignitary harms. Part V offers amendments to the definition of the term "employee," which would include partners, unless the employer proves by a preponderance of the evidence that the partner is either powerful enough to avoid discrimination or sufficiently disconnected from the organization as to diminish the effects of discrimination. Because legislative reform may be difficult to achieve, Part V offers an alternative solution to congressional amendment: a nuanced but operational interpretation of the Court's *Clackamas* opinion that would permit lower courts to define "employee" broadly to include an inquiry into the vulnerability of the partner to discrimination and the partner's dependence on the organization. This interpretation is consistent with the language, values, and purposes of the anti-discrimination statutes.

## II. FEDERAL CIVIL RIGHTS ACTS: DEFINING "EMPLOYEES" AND "EMPLOYERS"

### A. DEFINITIONAL DILEMMAS

Federal civil rights laws prohibit workplace discrimination against persons based on certain protected characteristics. These laws include Title VII, which forbids employment discrimination because of race, color, religion, sex, or national origin, the ADEA, which prohibits discrimination based on age over forty years; and the ADA, which outlaws discrimination because of a person's disability or relationship with a person with disabilities. Except where there are differences in statutory language, the courts generally interpret Title VII, the ADEA, and the ADA in the same manner, often using cases decided under one statute to support analogous holdings under a different statute.<sup>15</sup> This is particularly true where the issue of coverage arises.<sup>16</sup> The EEOC, the administrative body

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15. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 230 U.S. 133, 142 (2000) (stating that the Supreme Court had not squarely addressed the applicability of the *McDonnell Douglas* standard to the ADEA, but assuming its application); *Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000) (ADEA and Title VII); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 464-65 (2d Cir. 1997) (ADEA); *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996) (ADEA); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 833-34 (6th Cir. 1996) (ADEA); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 456 (9th Cir. 1995) (concluding that Title VII standards apply to the ADEA); *Pemrick v. Stracher*, 67 F. Supp. 2d 149, 169 n.15 (E.D.N.Y. 1999) (stating that courts analyze ADEA and Title VII claims consistently).

16. See, e.g., *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1313 (9th Cir. 1998) (concluding that *Darden's* common-law definition of employer applies to the ADEA); *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 747 (7th Cir. 1998) (applying *Darden's* common-law test to the ADEA); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 n.2 (6th Cir. 1997) (concluding that because Title VII, the ADEA, and the ADA define the term "employer" in essentially the same way, it should rely on cases decided under all three statutes in determining whether the defendant was the plaintiffs' employer under the

with authority to write guidelines interpreting Title VII and the ADEA and to promulgate regulations under Title I of the ADA, has concluded that issues concerning coverage of Title VII, the ADEA, and the ADA should be interpreted *in pari materia*.<sup>17</sup>

For coverage by Title VII, the ADEA, and/or the ADA, the business must classify as an "employer," defined under Title VII and the ADA as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."<sup>18</sup> The ADEA uses the same definition but requires twenty or more employees over the same time period.<sup>19</sup> These definitions of "employer" require an inquiry into how many employees a particular defendant has, often raising the question in small companies of how to define an "employee." This is precisely the issue raised in *Clackamas*, where the plaintiff, Wells, a bookkeeper, who was clearly the "employee" of the defendant professional corporation, sued alleging discrimination under the ADA. While there was no doubt that the plaintiff was an "employee" of the defendant, there was a question as to whether the defendant was

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ADEA and the ADA); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 631 (1st Cir. 1997) (adopting the common-law agency test to define "employee" in ADEA cases, in light of *Darden*); *Carparts Dist. Ctr., Inc., v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 16 (1st Cir. 1994) (ADA); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271-72 (7th Cir. 1986) (ADEA); *Davis v. Calgon Corp.*, 627 F.2d 674, 676 (3d Cir. 1980) (ADEA); *Healy v. AIG Tech. Servs.*, 2001 U.S. Dist. LEXIS 93, at \*3-4 (S.D.N.Y. Jan. 10, 2001) (describing the ADA and Title VII as "sister civil rights statutes"); *Westphal v. Catch Ball Prods., Corp.*, 953 F. Supp. 475, 478 n.3 (S.D.N.Y. 1997) (holding that part-time employees are "employees" for purposes of the ADEA if they are on the payroll for twenty or more weeks per year); *Garner v. Knoll Bros. Quick Marts, Inc.*, 962 F. Supp. 1115, 1121 n.5 (N.D. Ind. 1997) (Title VII); *Butler v. City of Prairie Vill.*, 961 F. Supp. 1470 (D. Kan. 1997) (ADEA); *Dejoy v. Comcast Cable Communications Inc.*, 941 F. Supp. 468, 473-74 (D. N.J. 1996) (concluding that courts treat ADEA, Title VII, and ADA cases interchangeably); *Whitchurch v. Apache Prods. Co.*, 916 F. Supp. 809, 812 (N.D. Ill. 1996) (holding no individual liability in an ADEA case, relying on precedent in ADA case); *Gardiner v. Dotson*, 1994 U.S. Dist. LEXIS 13412 (N.D. Ala. Sept. 19, 1994) (ADA); *cf. Beaulieu v. Northrop Grumman Corp.*, 161 F. Supp. 2d 1135 (D. Haw. 2000) (concluding that fact that plaintiff was an employee of the staffing firm did not preclude his status as an employee of the client firm in an ADA case).

17. See 29 C.F.R. § 1630.2(a)-(f) (1999); EEOC COMPLIANCE MANUAL, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS § 902, at 5480 n.10 (Dec. 3, 1997). Moreover, Title I of the ADA states that the "powers, remedies and procedures" of Title VII shall apply to discrimination claims under Title I of the ADA. 42 U.S.C. § 12,117(a) (1994); *Beaulieu*, 161 F. Supp. 2d at 1145 (citing to EEOC guidance and concluding that fact that plaintiff was an employee of the staffing firm did not preclude his status as an employee of the client firm in an ADA case).

18. 42 U.S.C. § 2000e(b) (2000); 42 U.S.C. § 12,111(5)(A) (2000). Workers for employers having fewer than the minimum number of employees under these laws may be protected against discrimination under other laws. For example, some state anti-discrimination laws do not limit the definition of "employer" to a business of a particular size. Thirty-nine states and the District of Columbia require fewer than fifteen employees to qualify as an employer under the anti-discrimination statute. See Ann C. McGinley, *Federal Equal Employment Opportunities Law and Alternative Work Arrangements*, in *CONTINGENT AND OTHER ALTERNATIVE WORK ARRANGEMENTS* (BNA) (forthcoming).

19. 29 U.S.C. § 630 (2000).



an "employer" as defined by the ADA. Because the ADA requires fifteen employees for a person to be a covered "employer"<sup>20</sup> and Clackamas Gastroenterology had only fourteen employees in addition to the four physician-shareholders who practiced medicine in the professional corporation, coverage hinged on whether the physician-shareholders were "employees" of the defendant Clackamas Gastroenterology.<sup>21</sup>

When the Supreme Court granted *certiorari* in *Clackamas*, the answer to this question was murky. The anti-discrimination statutes uniformly define an "employee" as "an individual employed by an employer,"<sup>22</sup> a curiously ambiguous and circular definition that has created significant problems for the courts. After the Supreme Court decided *Clackamas*, the answer is still unclear, given the lack of direction the Court gave to lower courts about how to weigh the factors in determining if a person is an "employee."

A second difficult question arises as to coverage of the anti-discrimination statutes. Even when it is clear that a particular business enterprise is an "employer" because it unquestionably employs the minimum number of employees required by the statute, there often arises a question as to whether a particular worker is covered by the statute. Because of the ambiguity of the statutory language, the question of whether an individual is an "employee" who can sue the "employer" is thorny. Both Title VII and the ADEA prohibit discrimination against an "individual" in hiring, firing, and terms and conditions of employment, but do not define the term "individual."<sup>23</sup> The ADA prohibits discrimination against a

20. I use the terms "employer," "covered employer," and "statutory employer" interchangeably throughout the article to refer to an employer who has the statutory minimum number of employees to be covered by the statute in question.

21. Congress's choice to use the same definition of "employee" to determine who is a covered worker under the acts and which firms are sufficiently large to be "employers" is problematic. Much of the law is somewhat distorted because of this choice. Congress would be better served to separate these definitions, counting as "employees" for purposes of determining whether an employer is a covered employer all of those individuals who regularly do work for the firm. The focus of this article is on whether partners themselves should be covered and able to sue under the anti-discrimination laws.

22. 42 U.S.C. § 2000e(f) (2000); 29 U.S.C. § 630(f); 42 U.S.C. § 12,111(4) (2000).

23. Title VII prohibits certain discriminatory practices:

(a) Employment practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his *employees* or *applicants* for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an *employee*, because of such *individual's* race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2) (2000) (emphasis added).

The relevant part of the ADEA states:

(a) Employment practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation,

"qualified individual" with a disability, but does not define the term "individual." Courts have interpreted the word "individual" to mean employee or applicant for employment as opposed to independent contractor,<sup>24</sup> limiting coverage to those individuals with an employment relationship, a prospective employment relationship, or a former employment relationship<sup>25</sup> with the statutory employer. Thus, the courts have held uniformly that independent contractors are not "employees" within the meaning of the anti-discrimination statutes.<sup>26</sup>

While *Clackamas* involves the question of whether a business is an "employer" for purposes of coverage under the ADA, it necessarily sets the standards for determining whether to count a physician-shareholder as an "employee" to see if the business meets the statutory minimum number of employees for coverage under the ADA. *Clackamas* also establishes the test for deciding whether courts should count partners as "employees" under the anti-discrimination acts.

*Clackamas* appears to provide a relatively simple answer to a series of complex problems concerning the applicability of the anti-discrimination laws: common-law principles of agency, as articulated in the *Restatement (Second) of Agency* governing the master-servant relationship, with a particular focus on the touchstone element of "control" will generally apply to determine whether a person is an "employee" under the anti-discrimination acts. The Court instructed the lower courts to interpret the common law through the lens of the EEOC Compliance Manual, which

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terms, conditions, or privileges of employment, because of such *individual's* age;

- (2) to limit, segregate or classify his *employees* or *applicants* for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* age.

29 U.S.C. § 623 (2000) (emphasis added).

The relevant part of the ADA states:

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

42 U.S.C. § 12,112(a) (2000).

24. See, e.g., *Jenkins v. S. Farm Bureau Cas.*, 307 F.3d 741 (8th Cir. 2002) (ADEA); *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir.), *cert. denied*, 528 U.S. 816 (1999) (Title VII); *EEOC v. N. Knox Sch. Corp.*, 154 F.3d 744, 746 (7th Cir. 1998) (ADEA); *Devine v. Stone, Leyton, & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996) (Title VII); *Frankel v. Bally, Inc.*, 987 F.2d 86, 88-89 (2d Cir. 1993) (ADEA); *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir. 1993) (ADEA); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495, n.13 (11th Cir. 1993) (ADEA); *Diggs v. Harris Hosp.-Methodist, Inc.*, 847 F.2d 270, 273-74 (5th Cir. 1988) (Title VII); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 339 (11th Cir. 1982) (Title VII). Independent contractors are covered by 42 U.S.C. § 1981, however, which forbids race discrimination in contracting.

25. See *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (holding that former employees can sue for retaliation under section 704(a) of Title VII).

26. See Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984).

establishes a list of factors for making the determination.<sup>27</sup> This analysis will not differ when the question is whether a person is an "employee" to count towards the minimum number of employees required by a statutory "employer," or whether the individual herself is an "employee" protected by the acts.

When determining whether shareholders in a PC are "employees," the analysis focuses more narrowly on the questions pertinent to the specific situation: for example, whether the individual collects compensation from the profits of the organization or a salary, whether the individual has power to control or manage his own work and the work of others, and whether, and if so, to what extent, the individual participates in managing the organization.

Although *Clackamas* advocates a simple "totality of the circumstances" test for deciding who is an employee under the anti-discrimination acts, approving the uniform application of the EEOC standards both to shareholders and partners, the Court based its reasoning on faulty assumptions made by previous courts and the EEOC. These assumptions are that ordinarily bona fide partners under state law who have all of the indicators of a partnership relationship are not "employees" and that a person can never classify as both an "employer" and an "employee."

#### B. HISTORY OF THE DEFINITIONS OF "EMPLOYEE" AND "INDEPENDENT CONTRACTOR"

When Congress passed Title VII in 1964, the Senate and House reports defined the term "employee" "in the manner common for federal statutes."<sup>28</sup> Because there was no common definition of the term in federal statutes, this term is ambiguous.<sup>29</sup> Some earlier courts applied the common law "control test" to define an "employee," requiring that the employer control the means of accomplishing the work and the results accomplished.<sup>30</sup> During the 1970s and the 1980s other courts adopted the economic realities test,<sup>31</sup> focusing on the economic dependence of the worker on the business of the employer.<sup>32</sup> Still others modified the economic realities approach for use in Title VII, creating a "hybrid" test.<sup>33</sup>

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27. *Clackamas Gastroenterology Assos. P.C v. Wells*, 123 S. Ct. 1673, 1680 (2003).

28. *See id.* at 90 (citing H.R. 1370, 87th Cong., 2d Sess., reprinted in EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2155).

29. For an excellent description of the courts' historical approaches, see Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 248-253 (1997).

30. *See, e.g., Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 339-341 (11th Cir. 1982) (approving the use of a common-law approach that takes into account the "economic realities of the relationship viewed in light of the common law," which focuses on the employer's right to control, but does not consider the "economic realities with respect to the dependence of the individual on the employment"); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

31. *See, e.g., Arbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983).

32. *See id.*

33. *See, e.g., Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979).

The "hybrid" test centers primarily on the alleged employer's right to control, but also takes into account additional factors such as:

(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice or explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the work accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.<sup>34</sup>

Even when ostensibly using the economic realities or the hybrid tests, however, many courts rely almost exclusively on the employer's right to control.<sup>35</sup>

In 1992, the Supreme Court decided *Nationwide Mutual Insurance Co. v. Darden*,<sup>36</sup> a case brought under the Employee Retirement Income Security Act of 1974,<sup>37</sup> ("ERISA"), holding that the common-law definition of "employee" applies to determine whether a person is an employee covered by ERISA or an independent contractor who is not covered. The common-law definition, according to the Court in *Darden*, which reflects the "general common law of agency, rather than the law of any particular State,"<sup>38</sup> includes a consideration of:

the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment, the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>39</sup>

The definition of "employee" in ERISA is "any individual employed by an employer." The Court noted that this definition "is completely cir-

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34. *Id.* at 832.

35. See e.g., *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986) (invoking the economic realities test but stating that the employer's right to control was the key factor to consider in a Title VII case).

36. 503 U.S. 318 (1992).

37. 29 U.S.C. §§ 1001-1461 (2000).

38. *Darden*, 503 U.S. at 323 n.3 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)).

39. *Id.* at 323-24 (footnotes omitted) (quoting *Reid*, 490 U.S. at 751-52).

cular and explains nothing,"<sup>40</sup> and there were no other provisions in the statute that would suggest that construing the statute in accordance with traditional agency principles would thwart Congressional intent or lead to "absurd results."<sup>41</sup> *Darden* quoted the broad language of *Community for Creative Non-Violence v. Reid*,<sup>42</sup> stating:

where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . . In the past, when Congress used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.<sup>43</sup>

The EEOC applied *Darden* to Title VII, the ADEA and the ADA.<sup>44</sup> Several lower courts also applied *Darden* to Title VII, holding that the traditional agency principles define who is an "employee" for anti-discrimination law purposes.<sup>45</sup> This response is justifiable because the anti-discrimination acts define "employee" in exactly the same manner as ERISA and there is no other indication in the anti-discrimination acts that the common law definition of "employee" would contravene the Congressional purpose or lead to absurd results.

Because *Darden* does not address the question in *Clackamas* of whether a physician-shareholder in a professional corporation is an employee under the ADA, it is not directly on point. However, *Darden* figures prominently in the discussion concerning how to decide whether a physician-shareholder is an "employee" because the definitions of "employee" under ERISA and the ADA are substantially identical.

Before discussing the applicability of *Darden* to *Clackamas*, the next section lays the foundation for understanding *Clackamas* by analyzing the relevant cases leading up to the Supreme Court's grant of *certiorari*. These include lower court cases concerning the question of whether partners or shareholders in professional corporations are "employees." An important related case decided by the Supreme Court addressed the question of whether an associate in a law firm organized as a general

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40. *Id.* at 323.

41. *Id.*

42. 490 U.S. 730 (1989).

43. *Darden*, 503 U.S. at 322-23 (quoting *Reid*, 490 U.S. at 739).

44. EEOC COMPLIANCE MANUAL, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS § 915.002 n.10 (Dec. 3, 1997).

45. See, e.g., *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 482-84 (8th Cir. 2000) (applying *Darden* to Title VII case, but concluding that *Darden* requires a consideration of many factors, including economic realities); *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997); *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994) (applying *Darden* to Title VII case); cf. *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 n.3 (9th Cir.), *cert. denied*, 528 U.S. 816 (1999) (concluding that *Darden* would apply to Title VII cases defining "employee" but using a slightly different test to determine whether an "employment relationship" rather than an independent contract existed between plaintiff and defendant).

partnership can sue the partnership for failing to admit her as a member.<sup>46</sup>

### III. PARTNERS AND SHAREHOLDERS: EMPLOYEES, EMPLOYERS, OR BOTH?

#### A. BONA FIDE PARTNERS: EMPLOYEES OR EMPLOYERS?

After Congress passed the 1964 Civil Rights Act, the courts generally assumed that the Act did not apply to the relationship between partners in a general partnership.<sup>47</sup> The relationship among partners was considered to be one among owners of the business, rather than an employment relationship. For example, in *Burke v. Friedman*,<sup>48</sup> the Seventh Circuit, employing sparse analysis, concluded that a partner in a public accounting partnership could not be considered an "employee" under Title VII for purposes of determining whether the defendant firm was a statutory employer. While acknowledging that partnerships are covered "employers" under the Act,<sup>49</sup> the court looked at language from three internal revenue cases and the Uniform Partnership Act, which defined a partnership as "an association of two or more persons to carry on as co-owners of a business for profits."<sup>50</sup> These definitions, according to the court, excluded partners in general partnerships as "employees" because they are "employers who own and manage the operation of the business."<sup>51</sup>

After *Burke*, in *Hishon v. King & Spalding*,<sup>52</sup> the Supreme Court decided the question of whether Title VII governs a law firm's refusal to invite a female associate to join the partnership. The plaintiff was hired in 1972, as an associate of a large law firm organized as a general partnership.<sup>53</sup> The partners denied her admission to the partnership in 1978 and 1979.<sup>54</sup> After filing a charge with the EEOC, she sued, alleging that the defendant had discriminated against her on the basis of her sex, thus violating Title VII.<sup>55</sup> The federal district court dismissed the complaint, concluding that Title VII did not govern the refusal to admit an associate into a partnership.<sup>56</sup> The Eleventh Circuit affirmed by a divided court.<sup>57</sup>

In an unanimous opinion, the Supreme Court reversed, holding that once parties establish a contractual relationship of employment, Title VII

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46. See *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

47. See, e.g., *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977) (assuming *arguendo* that partners are not covered by Title VII).

48. 556 F.2d 867 (7th Cir. 1977).

49. *Id.* at 869 (citing 42 U.S.C. § 2000e(b) (2000)).

50. *Id.* (quoting UNIF. P'SHIP. ACT § 6 (1914)).

51. *Id.* at 869.

52. 467 U.S. 69 (1984).

53. *Id.* at 71.

54. *Id.* at 72.

55. *Id.*

56. *Id.*; *Hishon v. King & Spalding*, 1980 U.S. Dist. LEXIS 16179 (N.D. Ga. 1980).

57. *Hishon*, 678 F.2d 1002.

attaches to govern aspects of the relationship.<sup>58</sup> The Court held that Title VII's prohibition of sex discrimination in the "terms, conditions or privileges of employment" applies to the decision of whether to offer an associate partnership status. The Court noted that the complaint alleged that the plaintiff had a contractual relationship with the defendant to be considered for partner on a "fair and equal basis." Furthermore, the Court observed that even if there were not a contractual right concerning particular benefits, an employer would violate Title VII by choosing to confer privileges in a way that discriminated against an employee on the basis of membership in a protected group.<sup>59</sup> The Court noted that there were several allegations in the complaint supporting the conclusion that the opportunity to become a partner at the law firm was "part and parcel of an associate's status as an employee at respondent's firm, independent of any allegation that such an opportunity was included in associates' employment contracts."<sup>60</sup> These allegations included the partnership's use of the opportunity to gain partnership as a recruiting tool and the termination of associates who did not become partners.<sup>61</sup>

King & Spalding argued that because elevation to partnership entails a change in status from an "employee" to an "employer," advance to partnership never qualifies as a "term, condition or privilege of employment." The Court responded, "even if respondent is correct that a partnership invitation is not itself an offer of employment, Title VII would nonetheless apply and preclude discrimination on the basis of sex. The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition, or privilege *of* employment."<sup>62</sup>

The Court also rejected King & Spalding's claim that Title VII exempts partnership decisions, noting that the defendant could point to nothing in the statute or the legislative history that would support such a *per se* exemption.<sup>63</sup>

Finally, the Court summarily dismissed King & Spalding's claim that application of Title VII would infringe upon the constitutional rights of expression or association, noting that although lawyers may contribute to the society's ideas, the defendant had not shown how Title VII's requirement that the plaintiff be considered on her merits for partnership inhibited the partners' ability to fulfill this function. The Court stated, "[invidious] private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."<sup>64</sup>

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58. *Hishon*, 467 U.S. at 74.

59. *Id.* at 75.

60. *Id.* at 76.

61. *Id.*

62. *Id.* at 77.

63. *Id.* at 77 n.10.

64. *Id.* at 78 (alteration in original) (quoting *Norwood v. Harrison*, 413 U.S. 455, 479 (1973)).

In an oft-quoted concurring opinion, Justice Powell argued that the Court's opinion "should not be read as extending Title VII to the management of a law firm by its partners."<sup>65</sup> He opined that the majority opinion does not "require" that the relationship among partners be considered an "employment relationship to which Title VII would apply."<sup>66</sup> He argued that the relationship among law partners differs significantly from that between employers and employees because partners make many sensitive decisions by consent.<sup>67</sup>

These decisions concern such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic, or political activities; questions of billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and expansion policies. Such decisions may affect each partner of the firm. Divisions of partnership profits, unlike shareholders' rights to dividends, involve judgments as to each partner's contribution to the reputation and success of the firm. This is true whether the partner's participation in profits is measured in terms of points or percentages, combinations of salaries and points, salaries and bonuses, and possibly in other ways.<sup>68</sup>

Justice Powell defined the "essence" of a law partnership as the "common conduct of a shared enterprise."<sup>69</sup> He conceded, however, that an employer may not evade Title VII simply by labeling employees as "partners" if they do not bear the markers of bona fide partners under state law.<sup>70</sup>

Finally, Justice Powell qualified the Court's rejection of the defendant's argument that its constitutional right to association protects its choice of partners. Agreeing that the contract was enforceable because it was an obligation voluntarily assumed, Powell concluded that Title VII may impede the "exercise of personal judgment in choosing one's associates or colleagues. Impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First and Fourteenth Amendments."<sup>71</sup>

After *Hishon*, lower courts split in their analysis of whether a partner is an "employee" for anti-discrimination law purposes. Although the unanimous opinion of the Court in *Hishon* permits, if not requires, that courts consider a partner to have an employment relationship with the partnership, many lower courts adopted Justice Powell's reasoning, holding that the relationship between a partner and the partnership is not covered by the anti-discrimination statutes.<sup>72</sup> These courts, rather than analyzing the

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65. *Id.* at 79 (Powell, J., concurring).

66. *Id.*

67. *Id.* at 79-80.

68. *Id.* at 80 n.3.

69. *Id.* at 79-80.

70. *Id.* at 80 n.2.

71. *Id.* at 80 n.4 (citations omitted).

72. See 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 4.03 (2d ed. 1994).



broad possibilities of the majority Supreme Court opinion in *Hishon*, focus on Justice Powell's statement that *Hishon* does not imply that partners are "employees" under Title VII. Like Justice Powell, they recognize a narrow exception to the general rule that partners are not "employees." They conclude that only individuals wrongfully labeled as partners who do not possess the indicators of a bona fide partner under state law are employees for anti-discrimination law purposes. These indicators include a share in the profits, liability for debts of the partnership, and some management or control of the partnership. This formalist approach does not permit a searching inquiry into the power relationships among the partners or between the partners and the partnership itself.<sup>73</sup> In fact, an examination of state law and the partnership agreement alone may suffice to conclude that a partner is bona fide and, consequently, not an "employee."

Other courts apply the "economic realities" test to determine whether the partners in a partnership are, in fact, "employees." This test differs somewhat from the economic realities test previously used to decide whether a worker is an independent contractor or an employee. In the independent contractor-employee cases, courts look closely at the dependence of the individual on the job in question for his or her economic well-being, a factor that would serve to separate workers who are true "independent" contractors from those who are employees of the business. Under the "economic realities" test as used to distinguish between partners who are "employees" and those who are not, courts focus on the relationship among the partners. This test considers the amount of power an individual partner actually has to formulate policy and make decisions in the partnership.<sup>74</sup> This approach ordinarily emphasizes the *political* power the partner enjoys, which is defined as the right to vote and to sit on partnership committees; however, this approach ignores the social and economic power or powerlessness of the individual.

Recently, the EEOC took a middle ground between these two approaches. While its position is closer to the economic realities test, it begins with a presumption against a partner's employee status. The EEOC published a guidance concerning the coverage of partners, officers, members of boards of directors, and major shareholders. The guidance states:

In most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees. An individual's title, however, does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee. The investigator should determine whether the individual acts independently and participates in managing the organization, or whether the

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73. See, e.g., *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 708-712 (7th Cir. 2002) (Easterbrook, J., concurring).

74. See e.g., *Strother v. So. Cal. Med. Group*, 79 F.3d 859 (9th Cir. 1996), *amended by, reh'g denied*, 1996 U.S. App. LEXIS 13202 (9th Cir. June 3, 1996); *Sidley Austin*, 315 F.3d at 698-08.

individual is subject to the organization's control. If the individual is subject to the organization's control, s/he is an employee. The following factors should be considered:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

Whether and, if so, to what extent the organization supervises the individual's work;

Whether the individual reports to someone higher in the organization;

Whether, and, if so, to what extent the individual is able to influence the organization;

Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

Whether the individual shares in the profits, losses, and liabilities of the organization.<sup>75</sup>

All three tests—the “economic realities,” the bona fide partner, and the EEOC test—presume non-employee status for most partners, treating partners as employees as an exception to the general rule. The Supreme Court in *Clackamas* implicitly accepted this premise as the foundation for its opinion.

In *Wheeler v. Hurdman*,<sup>76</sup> the Tenth Circuit, relying on Justice Powell's concurrence in *Hishon*, held that a partner in a large public accounting firm could not sue the firm for age discrimination because she was not an “employee.”<sup>77</sup>

The Tenth Circuit rejected the plaintiff's and the EEOC's litigation position that the court should consider the economic realities test or the “domination” theory to determine Ms. Wheeler was an “employer” rather than an “employee.” Instead, the court emphasized the nature of partnerships, the difficulty in applying a case by case test and the failure of Congress to clarify that general partners are “employees.”<sup>78</sup> It concluded that looking at “economic realities,” defined as dependence on the business, makes little sense in the partnership context. Whereas the “economic realities” test may appropriately distinguish between an independent contractor and an employee because the test demonstrates who is part of the firm and who is conducting a separate business, it should not decide which general partners are “employees” because all partners will be dependent on the firm business.<sup>79</sup> According to the Tenth Circuit, the domination test is also nonsensical because domination can occur for a number of practical reasons by agreement in a partnership by giving up control to a particular group or person to make decisions for the rest of the partners.<sup>80</sup> Other characteristics the court saw as distinguishing part-

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75. EEOC COMPLIANCE MANUAL § 2-III(A)(1) (May 12, 2001) (citations omitted), available at <http://www.eeoc.gov/policy/compliance.html> (last visited Nov. 19, 2003).

76. 825 F.2d 257 (10th Cir.1987).

77. *Id.* at 265.

78. *Id.* at 275-76.

79. *Id.* at 272.

80. *Id.* at 274.

nerships are the profit sharing, contributions to capital, part ownership of partnership assets, and the right to share in management subject to agreement.<sup>81</sup>

Furthermore, the court argued, partnerships are different from other business forms because employees do not assume the risks of losses and liabilities of their employers as partners do for their partners.<sup>82</sup>

Finally, the court criticized the EEOC's argument in the case that partners who are not powerful enough to prevent discrimination against themselves are "employees." This test, the court concluded, is entirely too liberal, a test that would sweep almost all partners in even the smallest partnerships into the purview of the anti-discrimination statutes.<sup>83</sup> Furthermore, the court opined, if this were the test to distinguish independent contractors from employees, many independent contractors would be protected by the statute.<sup>84</sup> While Congress could choose to amend the statute to expand its coverage in this way, the Tenth Circuit declined to expand the coverage of the Act.<sup>85</sup> The only exception that the court saw for coverage of a "partner" was the narrow exception mentioned by Justice Powell in *Hishon*. If the partnership labeled persons who were truly "employees" as partners in order to escape coverage of the anti-discrimination acts, the mislabeled partners may be employees under the acts.<sup>86</sup>

Another example of this narrow approach to defining partners as employees is Judge Easterbrook's concurring opinion in *EEOC v. Sidley Austin Brown & Wood*.<sup>87</sup> The concurrence, which is described more fully below,<sup>88</sup> asserted that partners are bona fide and therefore not employees simply if they share in the profits, are liable for debts, and have certain management control, as defined by state law. Judge Easterbrook refused to consider as "employees" those partners he defined as bona fide who, due to a strong self-perpetuating executive committee, in reality, have no power in the organization.

The Ninth Circuit took a more functional approach in *Strother v. Southern California Permanente Medical Group*.<sup>89</sup> Strother, an African American female medical doctor, was a partner of a 2,000 member partnership. After the defendant relieved her of many of her duties, the plaintiff sued, alleging that the partnership discriminated against her on the

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81. *Id.*

82. *Id.*

83. *Id.* at 275.

84. *Id.*

85. See also *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793 (2d Cir. 1986) (concluding that partners in a general partnership are not "employees" and holding that physician-shareholders should be treated as employees); *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400 (11th Cir. 1991) (assuming that a bona fide partner in a general partnership is not an employee).

86. *Hishon v. King & Spalding*, 467 U.S. 69, 79-80 (1984) (Powell, J., concurring).

87. 315 F.3d 696, 708-12 (7th Cir. 2002).

88. See *infra* notes 116-21 and accompanying text.

89. 79 F.3d 859 (9th Cir. 1996), *amended by, reh'g denied*, 1996 U.S. App. LEXIS 13202 (June 3, 1996).

basis of her race and sex in violation of the California Fair Employment and Housing Act (FEHA).<sup>90</sup> The lower court dismissed the complaint, concluding that, by virtue of her membership in the partnership, the plaintiff was not an "employee" under the FEHA.<sup>91</sup>

On appeal, the Ninth Circuit looked to the ADEA and Title VII for guidance because there was little California law concerning the definition of an "employee."<sup>92</sup> It concluded that the federal district court had erred in granting the defendant's motion to dismiss because the determination typically requires a factual inquiry that goes beyond the label of partner and the partnership agreement itself.<sup>93</sup> The court further stated that:

Courts must analyze the true relationship among the partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.<sup>94</sup>

Although the Seventh Circuit had applied a formalist approach in *Burke*,<sup>95</sup> in *Sidley Austin*,<sup>96</sup> Judge Posner, writing for two members of a three judge panel, adopted a functional approach to decide whether a partner is an "employee" under the ADEA. In *Sidley Austin*, the EEOC investigated whether the demotion of 32 of the law firm's equity partners to "counsel" or "senior counsel" violated the ADEA.<sup>97</sup> The EEOC issued a *subpoena duces tecum* to the firm, seeking documentation concerning the issues of whether the partners are "employees" covered by the ADEA and whether the partnership discriminated against them because of their age.<sup>98</sup> The lower court ordered the law firm to comply to the subpoena in full.<sup>99</sup> On appeal, the Seventh Circuit vacated the lower court's ruling and remanded to direct the law firm to comply with the part of the subpoena related to coverage. Once the firm completes its submissions of these documents, the Seventh Circuit stated, the lower court should determine whether the demoted partners are "arguably" "employees" under the ADEA.<sup>100</sup> If the lower court concludes that it is "plain on

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90. CAL. GOV. CODE §§ 12,900-12,996 (Deering 2003).

91. *Strother v. So. Cal. Med. Group*, 79 F.3d 859, 864 (9th Cir. 1996).

92. *See id.* at 866.

93. *Id.* at 867; cf. *Simpson v. Ernst & Young*, 100 F.3d 436, 440-41, 443 n.2 (6th Cir. 1996) (holding that a partner in a large public accounting firm was an employee for purposes of ADEA coverage despite his liability on firm debts because he had no authority to direct or participate in the admission or discharge of firm personnel, to participate in determining the compensation of personnel, including partners, to participate in the vote for chairman or the members of the management committee or to participate in the firm's profits).

94. 79 F.3d at 867.

95. *See supra* notes 48-51 and accompanying text.

96. 315 F.3d 696 (7th Cir. 2002).

97. *Id.* at 698.

98. *Id.*

99. *See EEOC v. Sidley & Austin*, 2002 U.S. Dist. LEXIS 2113 (N.D. Ill. Feb. 11, 2002).

100. *Sidley Austin*, 315 F.3d at 707.

the basis of uncontested facts" that the thirty-two partners were not "employees" for purposes of the ADEA, the lower court should excuse the firm from complying with the portion of the subpoena requesting documents that are relevant to the merits of the discrimination claim.<sup>101</sup>

In guiding the federal district court in its decision, Judge Richard Posner advocated a functional approach that considers the power of the partners within the law firm and eschews the automatic consideration of the partner's liability for the firm's debts.<sup>102</sup> This approach departs significantly from that expressed in the opinions in *Burke* and *Wheeler*. It chastises the parties for not briefing the reasons *why* some or all partners should be deemed employers and therefore not covered by anti-discrimination acts.<sup>103</sup> The opinion concluded that it is not inconsistent for a partner to be an "employee" even if the partner is an equity partner in a general partnership. The question, Judge Posner noted, is not whether the person is a "partner," but whether the person is an "employer."<sup>104</sup>

Judge Posner noted that Sidley & Austin is a large firm of more than 500 partners all of whose power resides in a 36 member unelected executive committee.<sup>105</sup> The executive committee is self-perpetuating—its members elect the subsequent committees.<sup>106</sup> While the executive committee delegates some powers to partners who are not members of the committee with respect to hiring, firing, promotion, and compensation of subordinates, these non-executive committee member partners are "at the committee's mercy. It can fire them, promote them, demote them (as it did to the 32), raise their pay, lower their pay, and so forth."<sup>107</sup> The executive committee set the incomes of the 32 partners as well. While each of the 32 partners served on other firm committees, all of the committees are subject to the control of the executive committee.<sup>108</sup> The court stated that the only firm-wide vote taken within the past 25 years occurred when the partnership merged with Brown & Wood, a vote that occurred after the EEOC began its investigation into the firm for violations of the ADEA.<sup>109</sup>

As evidence of the partners' "employer" status, Sidley & Austin argued that partners can bind the firm to contracts, share in the profits of the firm, participate in committees, and own some of the firm's capital.<sup>110</sup> Judge Posner dismissed these arguments stating that upper level manag-

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101. *Id.* The corollary also would appear to be true. If the lower court finds that the 32 partners are arguably employees, presumably, it will order that the firm comply with the remaining portions of the subpoena. This order would be a final order and appealable to the Seventh Circuit. *Id.*

102. *Id.* at 702-04.

103. *See id.* at 701-02.

104. *Id.* at 702.

105. *Id.* at 702-03.

106. *Id.* at 699.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 703.

ers in corporations have the same power to bind the corporation to contracts, serve on comparable administrative committees, and often own company stock;<sup>111</sup> no one doubts that these managers are "employees." Posner found unconvincing Sidley's contention that the partnership agreement delegated the partnership's power to the executive committee.<sup>112</sup> The "most partneresque" feature of these partners' relationship to the firm, concluded Judge Posner, is that they have unlimited liability for the firm's debts.<sup>113</sup> If the implicit reason, however, for holding that the ADEA does not apply to employers is that employers have sufficient power to avoid, or adequate remedies to redress, discrimination, he reasoned, unlimited liability cannot be the determinative measure for deciding who is an employee and who is an employer.<sup>114</sup> The issue of liability for partnership debts, according to Judge Posner, "illustrates the importance of referring the question of whether a partner in a particular firm is an employer or an employee to statutory purpose."<sup>115</sup>

As mentioned above, Judge Easterbrook concurred,<sup>116</sup> stating that the only issue is whether an individual is a bona fide partner.<sup>117</sup> According to Judge Easterbrook, a bona fide partner shares the risk, receives profits, is liable for the firm's debts, and is a member of a partnership whose agreement concords with state law.<sup>118</sup> A partner would not be bona fide if the individual did not possess these characteristics.<sup>119</sup>

Judge Easterbrook concluded that the 32 Sidley & Austin partners are bona fide partners because they share in the profits, have capital accounts at risk, and are personally liable for the firm's debts,<sup>120</sup> even though they have no management control or power within the organization. He also noted that no non-partner has an equity interest in the firm.<sup>121</sup>

#### B. SHAREHOLDERS IN PROFESSIONAL CORPORATIONS: FORM OR FUNCTION?

In *EEOC v. Dowd & Dowd, Ltd.*,<sup>122</sup> the Seventh Circuit held that lawyer-shareholders of a PC should not be counted as "employees" to determine whether the defendant met the statutory minimum of 15 employees under Title VII. The court relied on *Burke v. Friedman*,<sup>123</sup> in which the

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 704.

115. *Id.*

116. *Id.* at 708 (Easterbrook, J., concurring).

117. *Id.* at 709.

118. *Id.* at 710.

119. *Id.*

120. *Id.* at 709.

121. *Id.* He concurs in the majority's judgment because he is uncertain as to whether there are lawyers other than the 32 in the firm who are labeled "partners" but who actually do not possess the characteristics of the bona fide partner and who should be treated as employees under the ADEA. *Id.*

122. 736 F.2d 1177 (7th Cir. 1984).

123. 556 F.2d 867 (7th Cir. 1977).

Seventh Circuit held, before *Hishon*, that partners in an accounting firm were not "employees" under Title VII because partners manage and control a business as employers and share in its profits.<sup>124</sup> The court in *Dowd* rejected the EEOC's arguments that *Burke* was distinguishable because it related to the question of whether a partner in a partnership is an employee, not whether a shareholder in a PC is an "employee." The court concluded that the distinction between a shareholder and a partner was of "little value" under Title VII because the roles played by a shareholder and a partner are similar to one another and considerably different from the role played by shareholders in general corporations.<sup>125</sup> It noted that shareholders in a PC are not immune from liability for malpractice of the other shareholders and the management, control and ownership of the corporation is much like that of a partnership.<sup>126</sup>

In contrast, in *Hyland v. New Haven Radiology Assoc., P.C.*,<sup>127</sup> the Second Circuit held that a physician-shareholder in a PC who brought suit against the PC alleging age discrimination was an "employee" protected by the ADEA. The court reasoned that although it was generally accepted that partners are "employers" rather than "employees," courts should not ignore the voluntarily chosen form of business organization selected by the shareholders in a PC. The Second Circuit openly disagreed with the Seventh Circuit in *Dowd*, holding that "the use of a corporate form precludes any examination designed to determine whether the entity is in fact a partnership."<sup>128</sup> Moreover, the Second Circuit noted that while the "economic realities" test may be appropriate for distinguishing an employee from an independent contractor, this test should not apply in an attempt to identify an "employee" of a PC as a partner and manager.<sup>129</sup> There was no question, according to the court, that the plaintiff was an "employee" because he was an officer and shareholder of the corporation and was specifically designated an "employee" in the employment agreement signed with the corporation that described the terms and conditions of his employment.<sup>130</sup>

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124. *Id.* at 869.

125. *Dowd*, 736 F.2d at 1178.

126. *Id.*; cf. *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1399 (11th Cir. 1991) (holding that a member/shareholder of a professional association was as a matter of law not an employee under the ADEA because Fountain owned 31% of the firm's stock; was referred to as a partner by clients and employees and each other; shared final authority and responsibility in firm's operation; shared in the firm's profits, losses, and expenses; was compensated based on a share of the profits; was jointly and severally liable for certain debts; and had a right to vote on firm matters).

127. 794 F.2d 793 (2d Cir. 1986).

128. *Id.* at 798.

129. *Id.* The dissent agreed with the other two members of the panel on this point but reached a different conclusion about whether the form of the business should determine whether a person is an employee under the ADEA. *Id.* at 801 (Cardamone, J., dissenting) (concluding that the only two factors that should be considered are compensation and control; because Hyland had equal compensation and control he was not an "employee" under the ADEA).

130. *Id.*

C. *CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C. v. WELLS*<sup>131</sup>

In *Clackamas*, the Ninth Circuit followed *Hyland v. New Haven Radiology Associates, P.C.* and disagreed with the Seventh Circuit's opinion in *EEOC v. Dowd & Dowd*, concluding that physicians who practice medicine as shareholders and directors of a PC count as "employees" for purposes of determining whether the professional corporation is a statutory employer under the ADA.<sup>132</sup> The plaintiff, Deborah Anne Wells, a bookkeeper for eleven years with the defendant, sued, alleging that the defendant had violated Title I of the ADA, which prohibits discrimination because of a person's disability. The defendant filed a motion for summary judgment arguing that it was not covered by the ADA because it was not a statutory employer. Both sides agreed that there would be sufficient employees for ADA coverage only if the physicians who were the shareholders of the PC were counted as "employees" for coverage purposes.<sup>133</sup> The federal district court granted the defendant's motion for summary judgment, affirming the report and recommendation of the federal magistrate.<sup>134</sup> The magistrate considered the "true relationship among the individuals, including the method of compensation, the responsibility for the entity's liabilities, and the management structure and role in that management, to determine if an individual should be treated as an 'employee' under the employment discrimination laws."<sup>135</sup> He concluded that the four doctors were "employers" of the defendant PC rather than "employees,"<sup>136</sup> "more analogous to partners in a partnership than to shareholders in a general corporation."<sup>137</sup>

The Ninth Circuit Court of Appeals reversed, holding that professionals who make the voluntary choice to practice under the structure of a professional corporation are "employees." The Ninth Circuit panel<sup>138</sup> noted that the doctors who had chosen the corporate form over a partnership in order to achieve favorable tax treatment and limited civil liability could not deny that they were "employees" for purposes of coverage of the employment discrimination statutes.<sup>139</sup> The court stated that during the relevant time period the physician-shareholders had "actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment

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131. 123 S. Ct. 1673 (2003).

132. *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903, 905 (9th Cir. 2001).

133. See 123 S. Ct. 1673 (2003).

134. *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 2000 U.S. Dist. LEXIS 8574 (D. Or. May 5, 2000).

135. *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 2000 U.S. Dist. LEXIS 8590, \*10 (D. Or. Mar. 22, 2000).

136. *Id.*

137. *Id.*

138. There was one dissenting opinion that advocated following the Seventh Circuit approach. See *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903, 906-909 (9th Cir. 2001) (Graber, J., dissenting).

139. See *Wells*, 271 F.3d at 905.



agreements.”<sup>140</sup> Given the Ninth Circuit’s conclusion that the physician-shareholders were “employees” of the defendant, the defendant had the statutory minimum number of “employees” for purposes of coverage of the ADA and the plaintiff’s case could go forward.<sup>141</sup> The Supreme Court granted Clackamas’ petition for a writ of *certiorari*.<sup>142</sup>

### *I. Arguments Made by the Parties*

As explained in Part II.B above, *Darden* held that common-law principles should fill the gap left by ERISA’s ambiguous definition of “employee.” If *Darden* were controlling in *Clackamas* because of a similarly vague definition of “employee” in the ADA, we would expect the Supreme Court to apply agency principles to determine whether the physician-shareholders are “employees” of the PC. In fact, it appears that if the *Restatement (Second) of Agency* definition were applied to the fact pattern in *Clackamas*, the physician-shareholders may well be classified as “employees” of the professional corporation because the physician-shareholders were bound by an employment agreement with the corporation that established control over their activities.<sup>143</sup> The *Restatement (Second) of Agency* section 2 defines the difference between a master-servant relationship and that between a person and an independent contractor:

- (1) A master is a principal who employs an agent<sup>144</sup> to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
- (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
- (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

The *Restatement (Second) of Agency* defines a servant as:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.

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140. *Id.* at 906.

141. *Id.*

142. See 536 U.S. 990 (2002).

143. *Clackamas*, 123 S. Ct. at 1681 n.11 (citing J.A. 66, Tr. of Oral Arg. at 8).

144. The *Restatement* defines agency, principal, and agent as:

- (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
- (2) The one for whom action is to be taken is the principal.
- (3) The one who is to act is the agent.

RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
- a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  - b) whether or not the one employed is engaged in a distinct occupation or business;
  - c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - d) the skill required in the particular occupation;
  - e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - f) the length of time for which the person is employed;
  - g) the method of payment, whether by the time or by the job;
  - h) whether or not the work is part of the regular business of the employer;
  - i) whether or not the parties believe that they are creating the relation of master and servant; and
  - j) whether the principal is or is not in business.<sup>145</sup>

The Reporter's comments make it clear that the term "servant" is not limited to a person who performs manual labor. Instead, it states:

One who performs continuous service for another and who, as to his physical movements, is subject to the control or to the right to control of the other as to the manner of performing the service. The word indicates the closeness of the relation between the one giving and the one receiving the service rather than the nature of the service or the importance of the one giving it. Thus, ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them.<sup>146</sup>

Factors in *Clackamas* such as corporate structure, the employment agreement between the corporation and the physicians, the requirement that physicians follow work standards established by the corporation, their work location on premises leased or owned by the corporation and their reporting, at least for some purposes, to the personnel director indicate that they were "servants" under the *Restatement*.<sup>147</sup>

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145. RESTATEMENT (SECOND) OF AGENCY § 220.

146. *Id.* § 220 cmt. a.

147. *Clackamas*, 123 S. Ct. at 1681-83 (Ginsburg, J., dissenting) (noting that the physician-shareholders most likely fit the *Restatement* definition of "servant" because they provide services on behalf of the corporation, have employment contracts with the corporation, receive salaries and bonuses pursuant to the contracts, work at the clinic facilities owned or leased by the corporation, and must abide the standards established by the corporation in their work).

The petitioner, Clackamas Gastroenterology, argued to the Supreme Court, however, that common law, as modified by the EEOC guidelines,<sup>148</sup> should apply to determine whether the physician-shareholders are “employees” of the corporation. This modification is necessary, the petitioner argued, to assure consistency between the treatment of partners in general and limited partnerships, and shareholders in PCs.

At oral argument before the Supreme Court, the petitioner acknowledged that directors who work for a general corporation are considered “servants” of the corporation. The petitioner argued that because the *Darden* factors were designed to determine the difference between an “employee” and an independent contractor, many of the factors do not fit to distinguish “partners” from “employees.” Instead, the petitioner argued that *Darden* needs modification because when the *Restatement (Second) of Agency* was written in 1958, the professional corporation did not exist. Clackamas Gastroenterology is a PC whose structure and relationships are identical to those of a partnership; therefore, petitioner argued, it should be treated as a partnership. The petitioner argued that the EEOC guidance, which examines the factors relevant to the inquiry of whether a partner or shareholder in a PC is an “employee” under Title VII, the ADEA and the ADA, provides an appropriate modification of *Darden* in this area.<sup>149</sup>

The United States participated in the oral argument as amicus curiae. It urged the Court to follow the EEOC standards. According to the Government:

The EEOC started with the common, common (sic) law right to control test that is used to distinguish between independent contractors and employees and adapted it to make a distinction between those who were the proprietors of the business and that business’ employees, and it did so in a way to align its standards for looking at the question of shareholder-director with the same standards that have been used by all the courts in deciding whether partners . . . are employees.<sup>150</sup>

Like the petitioner, the United States justified this departure from *Darden* because *Darden* decided a different question: the standard for determining the difference between an “employee” and an “independent contractor.” Before *Darden*, the Court had twice interpreted broadly the term “employee” in federal statutes. Congress had overruled the Court’s broad interpretations legislatively to narrow the interpretation of the term to exclude independent contractors. Thus, in *Darden*, the Court cautiously limited the interpretation of the term “employee” to its common-law definition. Absent that specific history, however, the United States argued, the Court has recognized the purposes of statutes in interpreting

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148. 2 EEOC COMPLIANCE MANUAL §§ 605:0008-605:00010 (2000).

149. See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 2003 U.S. TRANS. LEXIS 13, \*1-13 (Feb. 25, 2003).

150. *Id.* at \*6.

terms in the statutes and their applications. The United States urged the Court to consider the EEOC's approach which uses the common-law definition of control as the base, but which additionally recognizes the purposes of defining "employees" in a particular way. One Supreme Court Justice asked counsel for the United States whether a person could be an "employer" for some purposes and an "employee" for others. His immediate response was, "no," stating that the EEOC guidance requires the court to make an "overall judgment" after considering the factors as to whether a person is an "employer" or an "employee." The Government's counsel did not explain why the EEOC standards do not permit a dual role.<sup>151</sup> This failure is fatal to the government's argument concerning the classification of partners for purposes of the anti-discrimination laws. As I will demonstrate below, partners can and do act both as employers and employees of the partnership. In fact, this dual role is obvious from the language of the statute.<sup>152</sup>

The respondent argued that even under the limited *Skidmore v. Swift & Co.*<sup>153</sup> deference to the EEOC guidance, the guidance must fail because it is unreasonable. As the guidance attempts to correct the inconsistency of treating partners and shareholders differently, it creates another inconsistency that counters the purposes of the ADA. A professional corporation with only one shareholder and 14 employees and one with 14 shareholders and 14 employees would be treated the same even though one business would have only 15 workers and the other would have 28 workers. Thus, respondent argued, the defendant-petitioner Clackamas, should be held to the form of corporation it voluntarily selected. Because the physicians chose to form a PC in order to limit their personal liability and to create favorable treatment under the tax laws, they should not be permitted to deny that they are "employees" under the ADA. This estoppel argument is powerful, but while it may have resolved *Clackamas*, it does nothing to determine which partners should be considered employees for purposes of the anti-discrimination acts. In fact, it may conceivably be used to conclude that no partners are covered employees under the acts.

## 2. The Supreme Court Opinions

In *Clackamas Gastroenterology Associates, P.C. v. Wells* the Supreme Court addressed the conflict between the Second and the Ninth Circuits.<sup>154</sup> The Court rejected the petitioner's claim that the answer to the

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151. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 2003 WL 840129, \*17-18 (U.S. Oral Arg. Feb. 25, 2003).

152. See discussion *infra* Part IV.A.

153. 323 U.S. 134, 140 (1944). The Supreme Court in *Clackamas* held that the *EEOC Compliance Manual* was a "body of experience and informed judgment" to which it could resort for guidance. 123 S. Ct. at 1680 n.9 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

154. 123 S. Ct. 1673, 1677 (2003). The Court noted that other circuits besides the Second, Seventh, and Ninth had conflicting opinions with regard to this question. *Id.* (noting that the Eighth Circuit had dealt with this issue as well).

question of whether a shareholder of a PC lies in the determination of whether the shareholder acts more as a "partner" and less like a shareholder in a general corporation.<sup>155</sup> Instead, the Court noted that there are many large partnerships in which the partners would qualify as "employees" for purposes of the anti-discrimination acts. "Thus, asking whether shareholder-directors are partners—rather than asking whether they are employees—simply begs the question."<sup>156</sup> The Court also rejected the formalist reasoning of the Ninth Circuit. The Supreme Court focused on two points. First, the congressional purpose in setting a statutory minimum number of employees in order for the "employer" to be covered was a legislative decision to protect small firms' ability to compete with larger firms and give easy entry into markets.<sup>157</sup> Second, the Court stated that the congressional silence concerning the meaning of "employee" under the Act "often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law."<sup>158</sup>

With these two points in mind, the Court noted that despite the nonexistence of professional corporations at common law, the common-law definition of the master-servant relationship, especially its focus on control of the master over the servant, provides helpful guidance in *Clackamas*.<sup>159</sup>

The Court approved of the EEOC standards concerning the broad question of who is an "employee" under the anti-discrimination laws and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees under the statutes.<sup>160</sup> The Court found persuasive the EEOC list of factors to consider in determining the specific issue of whether a shareholder-director is an "employee."<sup>161</sup>

Agreeing with the EEOC that the list is not necessarily "exhaustive," and that the answer to the question of whether a shareholder-director is

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155. *Id.* at 1678.

156. *Id.*

157. *Id.* at 1678-79.

158. *Clackamas*, 123 S. Ct. at 1679 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)).

159. *Id.*

160. *Id.* at 1679-80.

161. Those six factors include:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

Whether and, if so, to what extent the organization supervises the individual's work

Whether the individual reports to someone higher in the organization

Whether and, if so, to what extent the individual is able to influence the organization

Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

Whether the individual shares in the profits, losses, and liabilities of the organization.

*Id.* at 1680 (quoting EEOC COMPLIANCE MANUAL § 605:0009 (2000)).

an "employee" or an "employer" is not automatic,<sup>162</sup> the Court stated:

As the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor. Nor should the mere existence of a document styled 'employment agreement' lead inexorably to the conclusion that either party is an employee. Rather, as was true in applying common law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on "'all of the incidents of the relationship . . . with no one factor being decisive.'"<sup>163</sup>

The Court noted that some of the lower court findings in *Clackamas* indicate that the physician-shareholders are not "employees": the doctors "apparently"<sup>164</sup> control the operation of the clinic, share its profits, and are personally liable for malpractice claims.<sup>165</sup> On the other hand, the record also contained evidence suggesting an employment relationship between the clinic and the doctors: the physicians receive salaries, must comply with clinic standards, and report to a personnel manager.<sup>166</sup> Given this contradictory evidence, the Court reversed the Court of Appeals' decision and remanded the case for further proceedings.<sup>167</sup> The Court, however, gave the lower court little guidance about the relative weight to accord to each of the factors, a failure that could lead to widely inconsistent judgments. Justice Ginsburg in dissent, joined by Justice Breyer, criticized the majority for selecting control as the most important common-law indicia of a master-servant relationship over other indicia. The dissent argued that the physician-shareholders apparently meet the *Restatement (Second) of Agency* definition of "servant."<sup>168</sup> Justice Ginsburg noted that the *Restatement* defines a "'servant'" as "'an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.'"<sup>169</sup> The physician-shareholders seem to fit this definition because they provide services on behalf of the professional corporation, have employment contracts with the corporation, receive salaries and yearly bonuses, work at facilities owned or leased by the corporation, and must comply with standards set by the corpora-

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162. *Id.* at 1680 n.10.

163. *Id.* at 1680-81 (citations omitted) (omission in original).

164. *Id.* at 1681.

165. *Id.*

166. *Id.* at 1681 n.11.

167. *Id.* 1681.

168. *Id.* at 1681-82 (Ginsburg, J., dissenting).

169. *Id.* at 1681 (quoting RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958)).

tion.<sup>170</sup> The dissent noted that the introductory note to the *Restatement* states that highly placed personnel of a corporation are no less servants than those with more modest wages even when they are not controlled in their day-to-day work.<sup>171</sup>

Other factors led the dissent to conclude that the physician-shareholders were "employees" for purposes of the ADA. For example, the defendant, Clackamas, conceded that the physician-shareholders were "employees" for purposes of ERISA, covered by Oregon's worker's compensation statute, and had created an entity permitting themselves to limit liability for corporate debts.<sup>172</sup>

Furthermore, the dissent continued, there are no reasons why the ADA should not apply to this professional corporation. Congress exempted businesses having fewer than fifteen employees from the ADA to protect small firms from the expense of complying with the anti-discrimination laws. The dissent noted, however, that classification of the physician-shareholders in this case did not change the size of Clackamas Gastroenterology: during the relevant time period, the defendant regularly had four physician-shareholders and at least fourteen other employees.<sup>173</sup> Therefore, the dissent concluded, refusing ADA protection to the plaintiff, a clerical worker of defendant company, was unjustified.

Justice Ginsberg's bottom line is that a functional approach should determine whether a person is an employee under the anti-discrimination acts because this approach furthers the intention and language of the ADA. The test I propose below responds to Justice Ginsberg's concerns and gives operation to the majority test.

### 3. *Clackamas: No Resolution of Form Versus Function*

In *Clackamas*, the Court never explicitly addressed the split among the circuits concerning how to classify bona fide partners under state partnership law who have insufficient power in the organization to protect themselves from discrimination. By adopting the EEOC guidelines, *Clackamas* expanded the narrow exception recognized by Justice Powell's concurrence in *Hishon*. By requiring an inquiry into the ability of the individual to influence the organization, Standard Four of the EEOC guidelines apparently condones a close examination of the relationships within the partnership. But just how far the EEOC standards extend to permit a functional approach is unclear. *Clackamas* gives little or no guidance to the lower courts. It merely remanded the case to the lower court, noting that while it appeared that the physician-shareholders were not "employees," contradictory evidence existed in the record. This contradictory evidence included: an employment agreement, standards to which the physician-shareholders must conform, the collection of earn-

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170. See *id.* at 1681-82.

171. *Id.* at 1682.

172. *Id.*

173. *Id.* at 1682-83.

ings as salaries, and the power of the personnel director to control the doctors. The Court's opinion did not guide the lower court in deciding how to weigh the pro-employee factors against the counter veiling factors identified by the Court.

This discretion left to lower courts is both an opportunity to develop the law and a burden that may lead to simplistic and/or inconsistent results. Although the Court could have written a thoughtful opinion, similar to Judge Posner's opinion in *Sidley Austin*, it instead adopted a simplistic approach, laying out little more than the list of factors developed by the EEOC. In *Sidley Austin*, Judge Posner criticized the EEOC for automatically applying the standards and failing to understand and justify their use. Posner asked for a more robust examination of the distinction between a partner who is not an "employee" and one who is. The same criticism applies to the majority opinion in *Clackamas*. It fails in large part because with little analysis it implicitly adopts the presumption underlying the EEOC guidelines that bona fide partners who have the ability to exercise at least some control over the organization are ordinarily not employees.

Like the Supreme Court, however, Judge Posner makes another unexamined assumption: that the anti-discrimination laws do not permit an individual classification as both "employer" and "employee." When it comes to this assumption, I part company with Judge Posner's analysis. There are many bona fide partners under state partnership law who are "employers," as defined by the anti-discrimination acts, but who also should be "employees" for purposes of the acts. This duality is consistent with the anti-discrimination laws as I will demonstrate next in Part IV.A.

#### IV. CRITIQUE: *CLACKAMAS*' FAILED PROMISE

##### A. FAULTY FUNDAMENTALS: DUAL ROLES OF "EMPLOYER" AND "EMPLOYEE"

The statutory language makes clear that the Court's assumption in *Clackamas* that one cannot be an "employer" and an "employee" simultaneously is erroneous.<sup>174</sup> Title VII, the ADEA, and the ADA define a partnership, like a corporation, as a "person" who can be sued if it has sufficient "employees" to meet the definition of "employer."<sup>175</sup> The

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174. The dissent questions this assumption, but does not develop the argument that a partner or shareholder in a PC could occupy a dual role as employer and employee. See *id* at 1681 ("There is nothing inherently inconsistent between the coexistence of a proprietary relationship and an employment relationship." (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961))).

175. Title VII defines a person as "one or more individuals, governments . . . partnerships." 42 U.S.C. § 2000e(a) (1994).

Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." § 2000e(b) (emphasis added).

Like Title VII, the ADEA defines partnerships as persons, and defines an "employer" to include any agent of the person. 29 U.S.C. § 630(a)-(b).



ADA defines an "employer" to include an agent.<sup>176</sup> It also defines "person" in the same manner as Title VII.<sup>177</sup> Moreover, the anti-discrimination acts define an "employer" to include *agents* of a *person* engaged in industry affecting commerce with the requisite number of employees.<sup>178</sup> If the partnership has sufficient "employees" to be an "employer" under the acts, the partners act as the agents of the partnership for purposes of the anti-discrimination acts. For example, if a partner in a law firm fires an "employee" because of his race, the partnership will be liable to the "employee" under Title VII for the partner's action. The result is the same if a vice president or other manager of the corporation fires an "employee" because of his race. The partner and vice president are treated the same. They are both agents of the partnership and/or corporation. This agency relationship brings the partner and vice president within the definition of "employer" under the anti-discrimination law.<sup>179</sup>

No one doubts that the vice president who is an "employer" as defined by the anti-discrimination acts is also an "employee" of the corporation covered by the anti-discrimination law. Although the vice president or other upper level manager of a corporation can be simultaneously an "employer" and an "employee" under the anti-discrimination acts, the

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176. See 42 U.S.C. § 12,111(5) (2000).

177. See § 12,111(7).

178. See § 2000e(b).

179. All of the circuits that have addressed the issue of individual liability under the anti-discrimination statutes have held that supervisors are not subject to individual liability for violations. See, e.g., *Lissau v. S. Food Serv.*, 159 F.3d 177, 180-81 (4th Cir. 1998); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3d Cir. 1996) (en banc) (holding that individual employees may not be held liable under Title VII); *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996) (holding that relief granted under Title VII is against the employer and not the individual employee whose actions would constitute violation of the Act); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (holding that individual defendants with supervisory control may not be held personally liable under Title VII); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380-81 (8th Cir. 1995) (holding that supervisors and other employees cannot be held liable under Title VII in their individual capacities); *Cross v. Ala. State Dep't Mental Health & Mental Retardation*, 49 F.3d 1490, 1504 (11th Cir. 1995) (holding that individual liability suits under Title VII are inappropriate because the relief granted is against the employer and not individual employees); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (holding that the purpose of the agent provision is to incorporate respondeat superior liability into Title VII and that a supervisory employee can be sued only as an agent of an employer and not in a personal capacity); *Miller v. Maxwell Inst. Ins.*, 991 F.2d 583, 587-88 (9th Cir. 1993) (holding that civil liability under Title VII and the ADEA is limited to employers and that individuals cannot be held liable for damages). The First Circuit has not addressed the issue. *Lopez v. Police Dep't*, 247 F.3d 26, 29 (1st Cir. 2001).

However, if an individual meets the definition of "employer" in the anti-discrimination statutes there seems to be a potential for personal liability. Some courts have left the issue open. See, e.g., *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997) (holding that an individual employee/supervisor who does not otherwise qualify as an "employer" may not be held personally liable under Title VII); *EEOC v. AIC Sec. Investigations, Ltd.* 55 F.3d 1276, 1282 (7th Cir. 1995) (holding that individuals who do not meet the statutory definition of "employer" cannot be liable under the ADA); *Wilson v. Nutt*, No. 94-5750, 1995 U.S. App. LEXIS 35117 (6th Cir. Oct. 30, 1995) (holding that an individual defendant could be sued under Title VII in his official capacity as sheriff); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994) (holding that Title VII does not permit liability of individuals unless they meet the statutory definition of "employer").

Court assumes that a partner or shareholder cannot serve both roles of "employer" and "employee." The language of Title VII, the ADEA, and the ADA do not distinguish between partnerships and general corporations in their definitions of who is a "person" under the acts; neither does the statutory language distinguish between partnerships and corporations as "employers." It cannot be correct, therefore, that partners are not "employees" merely because they are "employers." The question becomes whether the law can justify differential treatment of vice presidents of corporations on one hand and partners on the other.

Once it is established that, consistent with the language and structure of the anti-discrimination acts, an individual may occupy the dual roles of "employer" and "employee," one possible justification for deciding that partners are not employees is that they are independent contractors who contract with the partnership. The Acts define "employee" as "an individual employed by an employer."<sup>180</sup> The courts have interpreted this language to distinguish between independent contractors and "employees." A covered employer<sup>181</sup> ordinarily will not be liable for discrimination against an independent contractor,<sup>182</sup> but will be liable for discriminating against its employees.<sup>183</sup>

The relationship between partners and the partnership is normally closer to an employment relationship than an independent contractor relationship. An independent contractor operates separately from a covered employer, often with employees of its own. The independent contractor does not ordinarily share space with the hiring party and will be paid by the job, rather than a salary or a draw of the profits of the covered employer's business. Often the independent contractor's work will not be the main focus of the covered employer's regular business. Finally, the independent contractor will often have special expertise in an area in which the employer is not an expert. It is because of this special expertise that the covered employer will refrain from controlling the work methods of the independent contractor, while still specifying the end results desired.

Partners in general partnerships have a much different relationship. Often, they agree to work together at the same locale using common employees, space, and materials. The partnership leases or owns the property where the work takes place and the partners work for the common goal of enhancing the business of the partnership. The partnership has more control over its partners than a covered employer has over its independent contractor, often determining either by vote of the entire part-

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180. 42 U.S.C. § 2000e(f) (1994).

181. By "covered employer" I mean one having the statutory minimum number of employees as required by the different statutes. *See* 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b); 42 U.S.C. § 12,111(5)(A).

182. An independent contractor who suffers race discrimination, however, may have a cause of action under 42 U.S.C. § 1981.

183. The Court has interpreted "employee" to include former employees suing for retaliation. *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

nership or by management committee the type of business it will pursue and the standards by which it will practice its business or profession.

While the partners are sometimes professionals who practice medicine or law independently, even professionals are ordinarily subject to standards and/or rules established by the partnership. Partners, unlike independent contractors, are bound to the partnership through a common interest, business, or profession. This commonality of partners, in contrast with the lack of connection of independent contractors to the covered employer, differentiates the two. Partners jointly own the assets of the business and are jointly and severally liable for its debts. Moreover, the law imposes fiduciary duties including duties of loyalty, care, and bargaining in good faith on one partner to another and to the partnership.<sup>184</sup>

In sum, working partners are rarely independent contractors of the partnership. If the anti-discrimination laws permit partners to be "employers" and "employees" simultaneously and partners work for the partnership in order to ensure its financial success in a connected fashion the partners should be "employees" of the partnership for purposes of the anti-discrimination laws.

There are three responses to this argument. First, partners are owners of the business and therefore are not "employees." Second, partners have intimate relationships deserving of constitutional and statutory protection. Third, partners have the right under partnership law to establish their relationship by contract and should therefore be permitted to waive the protection of the law through the partnership agreement. As discussed next in Part IV.B., none of these arguments is persuasive.

## B. DEBATABLE THEORIES FOR EXCLUDING PARTNERS FROM COVERAGE

### 1. *Partners as Owners?*

Equity partners are owners of the partnership; courts including the Supreme Court in *Clackamas* have concluded that this ownership interest prevents partners from classification as "employees."<sup>185</sup> If ownership were the determining factor, however, employees with stock options and those who own closely held corporations would also defy classification as "employees." The courts have never held that these workers' ownership interest precludes them from classification as "employees." The conclusion that partners are "owners" is insufficient to preclude their classification as "employees." Ownership, however, could be a substitute for the concepts of power and control. If a partner owns the vast majority of the shares in a partnership, the partner may have the political power derived from the ownership interest that would prevent the partner from discrimination by the partnership. While the power factor must be considered in

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184. UNIF. P'SHIP ACT § 103 (1997).

185. See, e.g., *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S. Ct. 1673 (2003); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996); *Fountain v. Metcalf, Zima, & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991).

determining the classification of the partner, ownership alone, without regard to quantity of ownership and the power deriving from the ownership interest is inadequate to preclude coverage of a partner as an employee by the anti-discrimination acts.

Professor Robert W. Hillman, an expert in partnership law who often writes about law firm partnerships, notes that there has occurred a decline in the loyalty of partnerships to lawyers who are partners.<sup>186</sup> While it has long been standard practice to include expulsion clauses in law firm partnership agreements, he notes that expulsion is becoming more common.<sup>187</sup> Acknowledging that there is a tension between removing a partner and his or her status as a co-owner, Hillman notes that the contradiction "can be resolved only by recognizing that the normal attributes of 'ownership' do not extend to partnerships, especially when the partnerships are professional service firms of significant size. Indeed, the status of the partner in the modern law firm may more closely approximate that of an employee than a 'co-owner' of the firm."<sup>188</sup>

Thus, an ownership interest alone is insufficient to distinguish a partner from an employee. It is necessary to look at the power the individual partner wields within the partnership in order to determine whether that person is an employee of the firm.

## 2. Constitutional Basis for Exclusion: Association and Speech?

In his concurrence in *Hishon*, Justice Powell gave two primary reasons for the conclusion that Title VII should not apply to partners. First, he suggested that Title VII may impede the "exercise of personal judgment in choosing one's associates or colleagues. Impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First and Fourteenth Amendments."<sup>189</sup> Second, Justice Powell argued that partners could not sue under Title VII because partners make sensitive decisions about many subjects, ranging from the compensation accorded to each partner to the type of work to take.<sup>190</sup> These decisions are shared, noted Justice Powell, by agreement or consent.<sup>191</sup>

While the Court's opinion in *Hishon* rejected the constitutional argument made by King & Spalding, Justice Powell's concurrence attempted to revive the constitutional claim. None of the other Supreme Court justices joined his opinion. Moreover, the argument concerning the right to intimate association is not cognizable under current Supreme Court pre-

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186. Robert W. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. LAW 1061, 1074 (2001).

187. *Id.*

188. *Id.* at 1074-75.

189. *Hishon*, 467 U.S. at 80 n.4 (Powell, J., concurring) (citations omitted).

190. *Id.* at 80 n.3.

191. *Id.* at 79-80.

cedent in the area of public accommodations law,<sup>192</sup> even where the speech rights would arguably be greater than those of partners in a commercial enterprise.

In *Roberts v. United States Jaycees*, for example, the United States Supreme Court held that by requiring the Jaycees to admit women to its regular membership, the Minnesota Human Rights Act did not violate the Jaycees' First and Fourteenth Amendment rights to freedom of intimate association and expression.<sup>193</sup> The Court explained that the freedom of association has two prongs. The first involves the freedom of intimate association, a "fundamental element of personal liberty."<sup>194</sup> This right protects certain personal bonds that play an important role in American culture and traditions because individuals draw emotional support and their identities from these close ties.<sup>195</sup> Among the relationships protected by this concept of individual liberty are those concerning marriage, family, raising and educating children, and co-habitation with one's relatives.<sup>196</sup> Relationships that are clearly not protected by this concept are those involving a large business enterprise.<sup>197</sup> For relationships falling in between these extremes, the Court endorsed considering a number of variables including: size, selectivity, seclusion from others in certain aspects of the relationship, purpose, policies, and congeniality.<sup>198</sup> The Court held that because the Jaycees had a large, unselective group of members and much of the Jaycee activity centers around the participation of strangers in the formation and maintenance of relationships, the members lacked the type of relationship that would be a protected intimate association.<sup>199</sup>

The second prong of freedom of association is the right to associate for the purpose of engaging in speech protected by the First Amendment.<sup>200</sup> While the Jaycees had a right to associative expression including the right not to associate with persons who have different views, this right is not absolute.<sup>201</sup> Examining the Minnesota Human Rights Act, the Court

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192. When Congress debated the specifics of Title VII the bill's opponents made claims very similar to those expressed by Justice Powell. The Southern Democrats who disagreed with Title VII argued that the bill violated their liberty rights to hire and work with whomever they desired. Congress passed the Act despite these arguments. See LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2064-65 (Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152) (United States Equal Employment Opportunity Comm'n ed., 1968) [hereinafter LEGISLATIVE HISTORY]. For more discussion of the opposition's arguments against Title VII, see Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1011-16 (1997).

193. 468 U.S. 609 (1984) (discussing MINN. STAT. § 363.03(3) (1982)).

194. *Id.* at 617-18.

195. *Id.* at 618-19.

196. *Id.* at 619-20.

197. *Id.* at 620.

198. *Id.*

199. *Id.* at 621.

200. *Id.* at 618.

201. See *id.* at 623.

concluded that the State had a compelling interest in removing the barriers to economic advancement and the political and social integration of women and minorities into society.<sup>202</sup> Moreover, Minnesota had advanced its interests by using the least restrictive means available.<sup>203</sup> The Jaycees were unable to show that the admission of women members would cause any serious burdens on the male members' freedom of expressive association. The Court emphasized that the Minnesota Human Rights Law did not attempt to suppress speech or to distinguish between prohibited and permitted activity on the basis of viewpoint, nor did it authorize the law's enforcement on such an impermissible basis.<sup>204</sup>

Justice O'Connor concurred, concluding that state regulation of commercial associative speech should be subject to the deferential rational relationship test, instead of the compelling state interest test. Citing *Hishon*, the concurrence noted that ordinary commercial law practice is not protected expression, while lawyering to advance social goals may fairly be characterized as speech.<sup>205</sup>

Soon after *Roberts*, the Court applied similar reasoning to the admission of women to the Rotary Club in *Board of Directors of Rotary International v. Rotary Club of Duarte* and upheld the Unruh California Civil Rights Act, which prohibited discrimination based on sex.<sup>206</sup> Like the Jaycees, the Rotary was unable to demonstrate that the admission of women would harm its ability to carry out its basic goals. Even if it were to show a slight infringement, the state's compelling interest in eliminating discrimination against women outweighed the speech interest of the defendant.<sup>207</sup>

The Court revisited the issue in *Boy Scouts of America v. Dale*,<sup>208</sup> holding that the application of New Jersey's Law Against Discrimination (LAD)<sup>209</sup> against the Boy Scouts (BSA) for firing a troop leader because he was gay would infringe the associative speech rights of the organization because it had a clear purpose to "instill values in young people."<sup>210</sup> Because the BSA had interpreted "values" to include an opposition to homosexuality<sup>211</sup> and the inclusion of Dale would cause some to believe that it condoned homosexuality, the New Jersey LAD prohibition of Dale's firing infringed on the BSA's associational expressive rights.<sup>212</sup>

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202. *Id.* at 623-28.

203. *See id.* at 629.

204. *Id.* at 623.

205. *Id.* at 636.

206. 481 U.S. 537 (1987) (upholding CAL. CIV. CODE § 51 (1982)).

207. *See id.* at 549.

208. 530 U.S. 640 (2000).

209. N.J. STAT. ANN. §§ 10:5-4 to :5-5 (2003).

210. *Dale*, 530 U.S. at 649.

211. A blistering dissent by Justice Stevens contradicted the majority's characterization of the BSA's opposition advocacy to homosexuality. *Id.* at 667-78 (stating that the Boy Scouts' "only policy written before the revocation of Dale's membership was an equivocal, undisclosed statement that evidences no connection between the group's discriminatory intentions and its expressive interests").

212. *See id.* at 650.

*Dale's* precedential value may be somewhat diminished after the Supreme Court's recent opinion in *Lawrence v. Texas*, which declared unconstitutional the Texas anti-sodomy law.<sup>213</sup> Even if *Dale* is good law, the circumstances there are significantly different from those in a partnership that attempts to discriminate against one of its partners. Unlike the Boy Scouts, a partnership is ordinarily in business for the purpose of furthering its own economic interests; therefore, it would be very unlikely that the First and Fifth Amendments would protect the partnership's freedom of association and associative speech. Moreover, like the Minnesota and California anti-discrimination laws, Title VII, the ADEA, and the ADA make no attempt to regulate speech or to discriminate on the basis of viewpoint. In *Hishon*, the unanimous Court rejected the defendant's First Amendment argument because the petitioner had not shown how its ability to contribute to society's beliefs would be inhibited by a merit-based consideration of *Hishon* for partner.<sup>214</sup> Moreover, the majority in *Roberts* cited to *Hishon* for the same proposition, comparing the Jaycees' failure of proof to that in *Hishon*.<sup>215</sup> Finally, in her concurrence in *Roberts*, Justice O'Connor stated that law firms do not generally engage in protected speech.<sup>216</sup>

An extraordinary, narrow exception to this general rule *might* conceivably exist. For example, a small family law firm might argue successfully that application of Title VII to define its partners as "employees" would violate the intimate right of association. A law partnership created to further the public interest by lobbying or bringing high stakes litigation might successfully defend a Title VII suit claiming that the law's application to its partners violates the right of associative speech. This, however, is a very limited exception, if it exists at all, to the general rule that the First and Fifth Amendments should not immunize a law partnership's selection and treatment of its partners from the reach of Title VII, the ADEA, and the ADA.

### 3. *Pragmatic Basis for Exclusion: Trust?*

Besides the constitutional dimension of Justice Powell's objection to treating partners as "employees," there is a pragmatic one. An organization making sensitive decisions about its members is vulnerable if a lawsuit reveals its decision making processes. A partnership makes subjective evaluations without having the courts second-guess them. A lack of trust from within could destroy a firm if a member of the firm could challenge its judgments in court. Moreover, the argument goes, courts are not capable of understanding the firm's decision making.

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213. 123 S. Ct. 2472 (2003). *But see id.* at 2497 (Scalia, J., dissenting) (noting that discrimination against homosexuals is a constitutional right in some circumstances).

214. 467 U.S. at 78. While Justice Powell raised the possibility of protection of a partnership from Title VII under the First and Fourteenth Amendments, no other Justices joined in his concurrence.

215. *Roberts*, 468 U.S. at 626.

216. *Id.* at 636.

The concept of a partnership as an intimate, selective, trusting relationship, similar to that of a marriage, appears throughout the cases and other literature on partnerships.<sup>217</sup> A striking example is *Bohatch v. Butler & Binion*<sup>218</sup> in which the Texas Supreme Court held that a law firm was not liable for a breach of fiduciary duty for firing a partner who suspected and reported another partner's ethical violations.<sup>219</sup> Rejecting the argument of a number of distinguished legal scholars who filed an *amicus* brief urging the court to recognize that public policy should forbid the expulsion of a partner who in good faith reports a suspected ethical violation, the court emphasized the "private," "intimate" and "selective" nature of the partnership, noting:

A partnership exists solely because the partners choose to place personal confidence and trust in one another . . . . Such charges, whether true or not, may have a profound effect on the personal confidence and trust essential to the partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.

. . . [T]he dissenting Justices do not explain how the trust relationship necessary both for the firm's existence and for representing clients can survive such serious accusations by one partner against another. The threat of tort liability for expulsion would tend to force partners to remain in untenable circumstance—suspicious of and angry with each other—to their own detriment and that of their clients whose matters are neglected by lawyers distracted with intra-firm frictions.<sup>220</sup>

In *Bohatch*, the Texas Supreme Court voiced arguments that were rejected by the United States Supreme Court years earlier in *Hishon*. These points are startlingly similar to those made by the opponents of Title VII in 1963 before its passage. Opponents made the libertarian argument that Title VII would deprive employers of the constitutional right of association rooted in the First Amendment to hire, work with, and discharge whomever they pleased.<sup>221</sup> Of course, Title VII passed into law in spite of this opposition; furthermore, opponents of Title VII have not convinced the courts that it is unconstitutional. Partnerships in large part are indistinguishable from other business forms: they are generally formed to make a profit. The relationship between partners, therefore, should not be protected as a sacrosanct exception to the application of the anti-discrimination laws.

Moreover, these arguments are similar to those already rejected by the Supreme Court in *University of Pennsylvania v. EEOC*.<sup>222</sup> In *University*

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217. See, e.g., Paula J. Dalley, *The Law of Partner Expulsions, Fiduciary Duty and Good Faith*, 21 CARDOZO L. REV. 181, 181 (1999).

218. 977 S.W.2d 543 (Tex. 1998).

219. *Id.*

220. *Id.* at 546-47.

221. See LEGISLATIVE HISTORY, *supra* note 192, at 2064-65.

222. 493 U.S. 182 (1990).



of Pennsylvania, an Asian-American filed a charge with the EEOC alleging that the university had denied her tenure on the basis of sex, national origin, and race.<sup>223</sup> The EEOC subpoenaed the files of the complaining party and of five male professors who were granted tenure at the time she was denied.<sup>224</sup> The university challenged the subpoena, arguing for a qualified privilege in peer review materials.<sup>225</sup> After the Third Circuit refused to recognize a qualified privilege,<sup>226</sup> the Supreme Court affirmed, unanimously holding that no qualified privilege should exist.<sup>227</sup> The university based its argument on the concept of academic freedom protected by the first amendment.<sup>228</sup> It claimed that without a privilege, the university's ability to shape its own identity was in danger.<sup>229</sup> A proper peer review system is necessary, the university claimed, to the future of the tenure system. Without confidentiality, authors of the peer review materials would be reluctant to write honest evaluations about candidates for tenure.<sup>230</sup> Moreover, the university claimed that compelling disclosure of peer review materials would create divisiveness and tension in the faculty, thus placing a strain on faculty relations and impairing the free exchange of ideas.<sup>231</sup> Because of these detrimental effects on academic freedom, the university argued, the first amendment compels recognition of a privilege.

An unanimous Supreme Court rejected these arguments, noting that the requirement that peer review materials be produced is neither content-based nor a direct infringement on speech.<sup>232</sup> Moreover, the Court noted, if a privilege existed, universities could use the privilege in a way that "frustrates the EEOC's mission."<sup>233</sup> The Court noted that "courts have stressed the importance of avoiding second-guessing of legitimate academic judgments."<sup>234</sup> While courts should continue to avoid overruling *legitimate* judgments made in academia, the Supreme Court opined, however, that a failure to permit the EEOC the power to investigate peer review documents may give a potent weapon to employers who are intent on violating Title VII.<sup>235</sup> The Court noted its concern that a ruling favoring the university could be used by law firms to shelter their decision making processes:

Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers,

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223. *Id.* at 185.

224. *Id.* at 186.

225. *Id.*

226. *See* EEOC v. Univ. of Pa., 850 F.2d 969 (3d Cir. 1988).

227. *Univ. of Pa.*, 493 U.S. at 199-200.

228. *Id.* at 188, 196.

229. *Id.* at 196.

230. *Id.*

231. *Id.* at 196-97.

232. *Id.* at 197-98.

233. *Id.* at 194.

234. *Id.* at 199.

235. *Id.* at 194 (citing EEOC v. Shell Oil Co., 466 U.S. 54, 81 (1984)).

musicians, lawyers? *It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms.*<sup>236</sup>

The relationship among partners is very similar to that among tenured professors. In fact, the average tenured law professor has more power than a typical partner in a large law firm. In both situations, the group makes sensitive decisions concerning the careers of persons applying for membership in the group and concerning the management of the organizational unit. Although disclosure of private information can cause tension among the ranks, the Court held in *University of Pennsylvania* that this objection is insufficient to prevent the EEOC from discovering documents relevant to proving that the institution discriminates illegally. While an argument exists that *University of Pennsylvania* is distinguishable because Congress specifically amended Title VII in 1972 to cover universities, no such amendment was necessary for partnerships. The original Act specifically included partnerships as covered persons. Moreover, it has never exempted partners from the classification of "employee."

Finally, if, as the Court's opinion in *Clackamas* suggests, the Court wishes to have consistency between similar business forms and relationships, a functional approach would compel that partners and tenured university professors be treated identically under the anti-discrimination laws. Identical treatment would require the recognition that many, if not most, partners be treated as employees under the anti-discrimination acts.

#### 4. Contractarianism and "Paternalism": Waiver of "Employee" Rights?

The American Law Institute ("ALI") membership approved the Revised Uniform Partnership Act ("RUPA") in 1995.<sup>237</sup> "RUPA reflects the policy judgment that, with rare exceptions, partners are permitted to govern relations among themselves by agreement."<sup>238</sup> Many of the new partnership "rules" under RUPA are default rules, not mandatory rules.<sup>239</sup> Partners, therefore, can choose to form contracts that would change the default rules. RUPA's endorsement of the freedom to contract furthers the notion that partners are equals who can bargain away protections provided by law. RUPA, however, also clarifies responsibilities among the partners and to the partnership—duties of loyalty, care,

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236. *Id.* (emphasis added).

237. As of 2002, thirty-one states have adopted RUPA with its 1997 Amendments, which provide limited liability for partners in a limited liability partnership. Three states have adopted RUPA with the 1994 Amendments, which explicitly address the fiduciary responsibilities of partners to each other, providing for express obligations of loyalty, due care, and due faith. The UPA had been adopted by all states, except Louisiana. National Conference Commissioners on Uniform State Laws, *A Few Facts about the Uniform Partnership Act* (2000), at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-upa9497.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa9497.asp).

238. See Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporter's Overview*, 49 BUS. LAW. 1, 1 (1993).

239. See *id.*

and good faith bargaining.<sup>240</sup> While these duties can be altered to some extent by agreement among the partners, they cannot be totally eliminated.<sup>241</sup> The reporter, Dean Donald Weidner explains:

Four fiduciary and information rules cannot be negated by the partnership agreement. First, the agreement may not "unreasonably restrict the right of access to books and records." Second, the agreement may not "eliminate the duty of loyalty," "but the partners by agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable. Third, the agreement may not "unreasonably reduce the duty of care." Fourth, the agreement may not "eliminate the obligation of good faith and fair dealing," "but the partners by agreement may determine the standards by which the performance obligation is to be measured, if the standards are not manifestly unreasonable."<sup>242</sup>

According to Dean Weidner, RUPA reaches a compromise between the "libertarians" who would like to see the parties held to their contracts and the "parentalists"<sup>243</sup> who support mandatory fiduciary duties, "especially to protect minority<sup>244</sup> partners."<sup>245</sup>

RUPA's changes were controversial among scholars specializing in partnership law.<sup>246</sup> The debate concerning RUPA's proposed changes in the fiduciary duties owed by partners reflected a discussion that was simultaneously occurring in corporate law concerning the proper role of government regulation in the corporation.<sup>247</sup> The contractarians, basing their theory on the law and economics movement, argued that a corporation is a set of private contractual relationships among providers of capital and services.<sup>248</sup> This view permitted corporate managers to contract out of their fiduciary duties to shareholders.<sup>249</sup> The anti-contractarians saw a greater role for government regulation in the corporation, arguing that the fiduciary duties of a corporate manager should be imposed by

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240. See *id.* at 21-23.

241. See *id.* at 26-27.

242. *Id.* at 26-27.

243. Dean Weidner uses the term "parentalists" rather than "paternalists," *id.* at 27, I assume, to avoid taking a gender-based approach.

244. The term "minority" is used here to denote a person with a minority interest in the partnership, not race.

245. Weidner & Larson, *supra* note 238 at 27-28; see also J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, LAW & CONTEMP. PROBS., Spring 1995, at 29 (arguing that the fiduciary duties should be handled by contract); Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, LAW & CONTEMP. PROBS., Spring 1995, at 55 (arguing that RUPA reduces the protections of fiduciary duties too drastically).

246. See Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 470-471 (1997) (describing the debate as "the kind of emotional responses normally reserved for religious or political debate").

247. See Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 3 (1990).

248. *Id.*

249. See *id.* at 4.

law and non-waivable.<sup>250</sup> Like the split among corporate law experts, the division over the revisions in the partnership law also featured contractarian and anti-contractarian views. The contractarians argued for a change in the fiduciary relationship among the partners, lessening the role of self-denial for the purposes of the partnership.<sup>251</sup> The anti-contractarians, however, sought to preserve more legal protections for greater fiduciary responsibilities.<sup>252</sup>

While the Reporter, Dean Weidner, views the result as achieving a balance between the interests of "libertarians" and those of the "parentalists," a debate that I choose not to engage here, there is no question that RUPA increased the ability of partners to contract out of certain fiduciary responsibilities. Moreover, those protections that remain deal merely with the economic relationship among the parties. RUPA does not account, for example, for the eventuality that an "equal" partner may suffer from discrimination in the partnership that can manifest itself in economic or dignitary harm because of the partner's sex, age, race, or disability.

In fact, partnership law appears unequal to the task. According to Professor Hillman, partnership law is inadequate to protect "unequal" partners in modern law firms:

Sadly, partnership law today remains largely premised on a unitary, classic model of the partnership—that is to say, partnerships are collegial and egalitarian associations of partners as co-equals, with each partner actively participating in the management of the firm and sharing in its profits and losses. This premise cannot be further from the reality of modern law partnerships. Non-equity partners, non-voting partners, contract attorneys, part-time partners, of-counsel, branch offices as quasi-independent units within partnerships, mass layoffs of partners, and limited income sharing (not so elegantly described on the street as "you eat what you kill") are among the concepts and activities increasingly prevalent but difficult to reconcile with the classic model of the partnership premised on the equality of partners. The simplicity of the structure suggested by law is defied by the complexity and diversity of modern law partnerships, which may suggest partnership law is losing its relevance to lawyers associated under the label "partnership."<sup>253</sup>

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250. See *id.*; see also Rutherford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 579 (1996) (arguing that fiduciary duties of corporate managers should be shaped by three principles: the manager's maximization of the corporation's wealth, the manager's avoidance of wealth transfers without consent, and the prohibition against the managers' allocation of gain to themselves). For a discussion of fiduciary duties and contract law, see Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 885 (1988), which notes that contract principles may be illuminating but make a limited contribution toward resolving issues of fiduciary duty.

251. See e.g., Hynes, *supra* note 245.

252. See Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993).

253. See Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 413 (1998) [hereinafter Hillman, *Legal Profession*]; see also Robert

Because RUPA does not protect the more vulnerable partners against discrimination, the anti-discrimination acts should apply, as a general rule, to most partners in partnerships. Because the anti-discrimination laws define "employers" as businesses having at least fifteen "employees," partnerships with fewer than fifteen employees, including partners who are employees, would not be covered by Title VII and the ADA. Partnerships with fewer than twenty employees, including partners who are employees, would not be covered by the ADEA.

If partners are "employees" under the anti-discrimination acts, they should not be permitted to waive coverage by contract. The courts have held that before a dispute arises an individual can waive his or her right to a *judicial forum* in favor of arbitration of a federal statutory right. This rule, however, does not apply to prospective waivers of *substantive* rights granted by the federal employment discrimination acts.<sup>254</sup> The purpose

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W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1 (1988) [hereinafter Hillman, *Grabbing and Leaving*] (discussing the conflicting obligations lawyers in law partnerships have under the professional rules, agency, partnership, and tort laws); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (arguing that the professionalism paradigm of the law firm should give way to a business paradigm that permits a better approach to serve clients). An argument can be made that, at least before RUPA, a partner violates a fiduciary duty to another partner and to the partnership itself by engaging in discrimination against the second partner. My research, however, has not unveiled any cases upholding a discrimination claim using fiduciary duty law. Another possible argument could conceivably be that discrimination by a partner or the partnership against a partner violates the covenant of good faith and fair dealing that is implied in all contracts. Cf. Paula J. Dalley, *The Law of Partner Expulsions: Fiduciary Duty and Good Faith*, 21 CARDOZO L. REV. 181 (1999) (arguing that an expulsion is not a breach of fiduciary duty; however it may violate the implied covenant of good faith and fair dealing). While these approaches may be possible, they would depend on the vagaries of state law and would not provide the same remedies or protections as the federal anti-discrimination laws. For example, California provides merely contract remedies in employment cases where the plaintiff proves a breach of the implied covenant of good faith and fair dealing. See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 663 (1988). Likewise, in a suit alleging that race discrimination in employment violates the state's public policy and would, therefore, create a wrongful discharge cause of action in a small employer, the Nevada Supreme Court held that there was no wrongful discharge. See *Chavez v. Sievers*, 43 P.3d 1022 (Nev. 2002) (concluding that it was up to the Nevada legislature to define "employer" and that the legislature had determined that small employers were not covered by the Civil Rights Act, NEV. REV. STAT. 613.330(1) (2003)).

254. See *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). The Court stated that: To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

behind this general rule is sound. The federal employment discrimination statutes are reflections of public policy that an individual should not be permitted to waive substantive civil rights in order to gain advantage over others who leave open the option to seek the laws' protection. Such a waiver could potentially create the atmosphere of a "race to the bottom," with employers typically requiring employees to forego their federal statutory rights in order to gain employment. This behavior would lead to the weakening of the statutory protections for all members of the protected classes. Lawyers would advise their business clients to attempt to "contract out" of their equal employment opportunity responsibilities because the law would permit such advice.<sup>255</sup> If such contracts were made, businesses and partnerships would be less concerned with avoiding discriminatory behavior against members of protected classes.

Thus, a person entering into a partnership agreement could not properly waive his or her substantive statutory rights by agreeing that he or she will not be treated as an employee if his or her function within the organization is that of an employee, as defined by the statutes.

Even if a potential partner has superior economic bargaining power at the time of the formation of the partnership agreement, the law should refuse to allow him or her to waive federal statutory rights before the dispute arises. The federal anti-discrimination laws protect dignity interests as well as economic interests and a determination of whether a partner fits the definition of employee should be made *after the dispute arises* based on the function of the person within the organization, his or her relationship with the other partners, and his or her connection to the organization.

### 5. Partnerships as "Aggregates" or "Entities"?

The original concept of a partnership, the aggregate theory, concluded that a partnership was an aggregate of individuals.<sup>256</sup> Under this theory, when one partner resigned, the partnership dissolved and a new partnership formed.<sup>257</sup> Because this theory created problems in stability and continuity, the Revised Uniform Partnership Act ("RUPA") explicitly

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*Id.* at 50-51 (citations omitted). Referring to other cases in which the Court had enforced arbitration of statutory rights, the Court stated, "[i]n these cases we recognized that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (discussing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); see also *Adams v. Phillip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1985) ("It is the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA.").

255. Cf. Therese H. Maynard, *Law Matters, Lawyers Matter*, 76 *TULANE L. REV.* 1501, 1526-27 (2002) (arguing that for lawyers to advise their business clients in a way that would lead to fair outcomes for all, lawyers need to be assured that the fiduciary duty of loyalty is mandatory, not waivable).

256. See Weidner & Larson, *supra* note 238, at 5.

257. See *id.*

endorsed the entity theory of partnership,<sup>258</sup> which treats the partnership as an entity rather than an aggregate of individuals.<sup>259</sup> Under the entity theory, when one partner leaves the partnership, the partnership can continue to exist without creating a new partnership.<sup>260</sup>

By defining a "partnership" as a "person" capable of being sued, Title VII, the ADEA, and the ADA, even before the approval of RUPA, applied the entity theory to partnerships. RUPA's endorsement of the entity theory supports the view that a partnership is a separate entity subject to a lawsuit under the anti-discrimination statutes. Thus, the aggregate theory does not bar the conclusion that a partner is an "employee" who can sue the partnership, a separate entity.<sup>261</sup>

Joint and several liability may be the only obstacle to suit by a partner against the partnership for discrimination, and the only indicator that the partner is not an "employee." A conclusion that a partner's liability for obligations and debts alone is sufficient to prevent classification as an "employee" under the anti-discrimination laws, however, would contravene the policies of the acts. In *Sidley Austin*, Judge Posner expressed doubts about whether this responsibility is sufficient to immunize the partnership from a lawsuit by older equity partners who were demoted.<sup>262</sup> Partners who lack political, economic and/or social power but who are responsible for debts are likely very vulnerable to discrimination and its effects.

The anti-discrimination laws' policies include protecting the economic well-being and the dignity of workers regardless of their race, color, national origin, religion, sex, age, or disability, compensating workers for their losses and deterring future losses. These policies, Congress believed, would further the ability of persons who are vulnerable to discrimination in employment to gain and retain employment consistent with their abilities.<sup>263</sup> Part IV.C expounds on the Court's failure to discuss the important aspect of vulnerability in determining whether a partner is an "employee," and the increasing role dignitary harms play in discrimination law.

### C. PROTECTING AGAINST VULNERABILITY TO DISCRIMINATION

*Clackamas* never considered the individual's vulnerability to discrimination and its economic and social effects as factors to weigh in deciding

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258. *Id.* at 5-6.

259. UNIF. P'SHIP ACT § 201 (1997).

260. See Weidner & Larson, *supra* note 238, at 8.

261. At least one scholar has criticized RUPA's claim of endorsement of the entity theory as "bald hyperbole," however. See Robert W. Hillman, *RUPA and Former Partners: Cutting the Gordian Knot with Continuing Partnership Entities*, LAW & CONTEMP. PROBS. Spring 1995, at 7, 28. Professor Hillman concluded that "true implementation of the entity model would eliminate joint and several liability of partners, which is a strong vestige of the aggregate view of partnerships." *Id.*

262. *EEOC v. Sidley Austin*, 315 F.3d 696, 704 (7th Cir. 2002).

263. For a discussion of the legislative history of Title VII demonstrating a merit-based approach to the statute, see McGinley, *supra* note 192, at 1011-16.

whether an individual is an "employee." My thesis posits that if an individual's lack of power in the organization creates a potential for vulnerability to discrimination and its effects, this factor should weigh heavily in favor of treating him or her as an "employee."

In *Clackamas*, upon remand, the lower court should go beyond political power, considering in addition whether the dynamics, organization, and power, both economic and social, may subject one or more of the physician-shareholders to vulnerability to discrimination and its effects. Moreover, a broad interpretation of Standard Four of the EEOC, "[t]he ability to influence the organization," encompasses not only the power granted in the documents or oral history establishing the relationship, but also the actual relationship among the partners or shareholders. If, for example, the dynamics or structure of the organization would permit three of the four shareholder-physicians in *Clackamas* to decide to oust or reduce the salary or bonus of the fourth because she is pregnant or has a disability, that relationship between the PC and the individual-shareholder most likely would be one of an employer-employee. The court should reach the same conclusion if the power dynamics permit sexual or racial harassment of one of the partners.

*Clackamas* also fails to consider that Title VII, the ADEA, and the ADA protect not only economic interests, but also the dignity interests of the individuals. Congress made the dignitary rights explicit when it passed the 1991 Civil Rights Act, which amended Title VII and the ADA. In these amendments, Congress added the right to jury trials of legal claims and compensatory and punitive damages where intentional discrimination occurs.<sup>264</sup> The legislative history of the 1991 Act demonstrates that a driving force for adding jury trials and compensatory and punitive damages was the increasing recognition of hostile work environment claims.<sup>265</sup> While the hostile work environment might not produce a tangible, adverse job action such as a firing or failure to hire, a plaintiff may establish a cause of action by demonstrating that the hostile work environment based on an individual's protected characteristic affected the terms, conditions or privileges of her employment.<sup>266</sup> Even if the plaintiff cannot demonstrate any economic damages in the form of lost salaries or bonuses, she may collect compensatory and punitive damages for emotional distress inflicted upon her by her equals. The recognition

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264. 42 U.S.C. § 1981(a) (2000). The ADEA already granted a right to a jury trial and to double damage for willful violations.

265. See Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1450-51 (1996). See generally *Meritor Savings Bank v. Vinson*, 477 U.S. 557 (1986) (holding that Title VII created a cause of action for a hostile work environment that altered the terms, conditions or privileges of a person's employment because of her sex); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (concluding that a person can bring a hostile work environment cause of action even though the woman does not have to leave work or have a nervous breakdown if she proves that it is severe or pervasive objectively and subjectively).

266. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).



of harassment as a form of discrimination has expanded the law and should broaden the interpretation of the definition of "employee." If vulnerability to discrimination is one possible factor in determining whether an individual in an organization is an "employee," the courts should consider vulnerability to emotional and dignitary harm as well as vulnerability to tangible economic harm. Even an equity partner or shareholder could be vulnerable to discrimination, ranging from economic loss to the emotional distress caused by a hostile work environment.

It is not uncommon for white women and persons of color who are considered "equals" of the white men to suffer discrimination at the hands of their co-workers. In *Walking Out on the Boys*, author Dr. Frances Conley, a professor of neurosurgery at Stanford University and Chief of Staff at the VA Palo Alto Health Care System, describes the egregious sexual harassment that she endured for 23 years from other neurosurgeons with whom she worked. Finally, after realizing that her silence was enabling the male doctors to sexually harass students and subordinates, she resigned and made a public statement.<sup>267</sup>

Recent social science research also suggests that women in high level jobs "equal" to men are not immune from discrimination. In *"Saying and Doing" vs. "Said and Done": Gendering Practices, Practicing Gender at Work*, Dr. Patricia Martin, a noted feminist sociologist, discusses her field work in organizational behavior, which focuses on gender practices and how men and women "practice gender."<sup>268</sup> Dr. Martin observes gender practices occurring to women who are "equals" in the workplace that make it difficult for the women to thrive at work.<sup>269</sup> Such practices include men's exclusion of women in their socializing behavior,<sup>270</sup> and the gendered assumption that even women who are equals will engage in stereotypically "female behavior," such as answering the phone for the men.<sup>271</sup> Dr. Jennifer L. Pierce in *Gender Trials: Emotional Lives in Con-*

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267. FRANCES K. CONLEY, *WALKING OUT ON THE BOYS* 106, 109 (1998).

268. Patricia Yancey Martin, *"Saying and Doing" vs. "Said and Done": Gendering Practices, Practicing Gender at Work*, 17 *GENDER & SOC'Y* 342, 342 (2003); see also JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 103-42 (1995) (describing the different ways in which women and men litigators approach their jobs and the influence gender has on behavior and identity).

269. Martin, *supra* note 268.

270. *Id.* at 357.

271. Dr. Martin tells a story that is illustrative of male-female relationships at work and how gender is practiced to women's detriment even where the men and women are supposedly co-equals. These stories raise themes that are familiar to most women working in a male-dominated environment, especially to women lawyers, partners, and associates working in law firms.

The first story goes as follows:

Tom and Betsy, both vice presidents in a Fortune 100 company, stood talking in a hallway after a meeting. Along the hallway were offices but none was theirs. A phone started to ring in one office and after three or so rings, Tom said to Betsy, "Why don't you get that?" Betsy was surprised by Tom's request but answered the phone anyway and Tom returned to his office. Afterwards, Betsy found Tom to ask if he realized what he had done. She told him: "I'm a vice-president too, Tom, and you treated me like a secretary. What were you thinking?" Betsy's reaction surprised Tom. He did not mean

*temporary Law Firms*, describes her study of paralegals and lawyers in a large law firm and a corporate legal office. She notes that, "gender shapes the experiences of women in the legal profession at the structural level at the same time that women and men as litigators reproduce gender at the micro-level of interactions and identity."<sup>272</sup>

Furthermore, there is much research demonstrating the changing mores of law firm partnerships.<sup>273</sup> While the competition for business has increased, so has lawyer mobility. According to Professor Robert W. Hillman, these changes have had "a profound effect on the relations of partners within law firms."<sup>274</sup> The "most dramatic effect" Professor Hillman notes, is the "reallocation of a firm's income in favor of partners with loyal client bases, an event that often is combined with a consolidation of management in the hands of these same lawyers."<sup>275</sup> These diverse bodies of scholarly literature highlight the danger that a partner may be vulnerable to illegal discrimination. No longer can partnerships hide behind the veil of intimacy, trust, and proprietary interest when discrimination impedes a partner's ability to function and thrive at work. Instead, the courts must consider all of the circumstances surrounding the relationship to determine the vulnerability of the partner to discrimination and its effects before determining whether the partner is an employee.

#### D. EMPLOYEE COVERAGE: CONNECTEDNESS AND SOCIAL, ECONOMIC, AND/OR POLITICAL POWER

Whereas the relationships between working partners ordinarily differs substantially from that of an independent contractor and the business with whom it contracts, consideration of the courts' distinction between

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anything by his action, he said, commenting: "I did not even think about it." Tom apologized to Betsy. She told Tom his behavior was "... typical of how men in High Tech Corporation [a pseudonym] treat women. You're patronizing and [you] don't treat us as equals." Tom was again surprised and decided to ask other women if they agreed with Betsy.

*Id.* at 346. Dr. Martin notes that both Tom and Betsy were practicing gender in this vignette. Tom, who expected Betsy to answer the telephone for him, treated her as a subordinate, as someone whose responsibility it was to be his helper. Betsy, in turn, while feeling surprised at Tom's expectation, answered the telephone. Betsy was practicing gender by acting as Tom's helper and subordinate. She further practiced gender when she raised the issue to Tom later, distinguishing herself from the common secretary. She did not question whether Tom had the right to ask a secretary to answer the phone. That is, she found it acceptable and within the normal order of things for Tom to expect a secretary, who is more likely a female, to help him. It was not acceptable, however, for Tom to treat Betsy like a secretary. *Id.* at 346-47.

272. PIERCE, *supra* note 268, at 104, 107-08 (finding that women lawyers face exclusionary practices by male colleagues in informal socializing, an important mechanism for obtaining trust in the law firm, by being subject to reminders that they are not part of the male culture and by sexual harassment).

273. See e.g., Hillman, *supra* note 186, at 1067; Hillman, *Legal Profession*, *supra* note 253, at 413 (1998); Hillman, *Grabbing and Leaving*, *supra* note 253 (discussing the conflicting obligations lawyers in law partnerships have under the professional rules, agency, partnership, and tort laws); Pearce, *supra* note 253.

274. See Hillman, *supra* note 186, at 1067.

275. *Id.*

independent contractors and employees should enlighten the formulation of a test to decide which partners are employees. The distinction between independent contractor and employee, according to the courts, rests with the power the employer has to control the worker. The more power an employer possesses to control the worker and the manner of production, the more likely the worker will be an employee. The original use of the control test was to decide whether the business should be liable for the negligent acts of a worker who injures a third party, not to determine what obligations the employer owes to a worker. This use illustrates the limitations of control as the dominant factor in deciding the difference between an employee and an independent contractor. Control as a measure of employer liability to third parties is effective because it rests on the notion that an employer should be liable for a worker's negligence only if the employer has the means to prevent it.<sup>276</sup> Control is not, however, the optimal consideration for determining the relationship between the employer and the worker and whether that relationship constitutes an employer-employee relationship. That relationship should depend on, I propose, whether the worker is connected to, and dependent on, the business economically and/or socially, factors which are more appropriate to the determination of who is an independent contractor excluded from coverage of the acts.

### *1. Independent Contractors: Justifications for Exclusions from Coverage*

There is general agreement that the anti-discrimination laws exclude independent contractors from coverage. In *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, however, authors Lewis Maltby and David Yamada argue that the anti-discrimination laws should be amended to cover independent contractors and their employees.<sup>277</sup> Their recommendation stems from a concern for the rise of contingent workers, many of whom are lowly paid, vulnerable to discrimination, and treated as independent contractors by the courts under the common law, economic realities and/or hybrid tests.<sup>278</sup> Coverage of independent contractors and their employees, Maltby and Yamada argue, would offer legal protections to the maximum number of employees, avoid tampering with the common-law definitions of "employee" and "independent contractor," and remove incentives from employers who classify workers as "in-

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276. See DAN B. DOBBS, *THE LAW OF TORTS* § 10 (2000). Tort law has also added another justification for holding employers liable for the negligence of its workers: the ability to spread the risk to the entity that is most able to pay the insurance and to guarantee compensation to injured accident victims. To some extent, then, even in the third party cases, the law has changed to favor more compensation of victims.

277. Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239 (1997).

278. See *id.* at 242.

dependent contractors” to avoid coverage of the anti-discrimination laws.<sup>279</sup>

Maltby and Yamada correctly note the difficulty courts have had in distinguishing independent contractors from employees when using the control test. While passage of Maltby and Yamada’s proposed amendment would offer the most protection to the most individuals, theoretically, there are legitimate justifications for excluding “true” independent contractors, as I define them, from coverage. These justifications include the economic and social independence of the independent contractor from the business with whom it contracts. A new, narrower definition of independent contractor would protect those who are truly vulnerable to discrimination at work, while continuing to exempt “true” independent contractors from the coverage by the statute.<sup>280</sup>

The key factors for distinguishing an independent contractor from an employee should be the connectedness with and dependence on the institution, both economically and socially, that the employee has and the independent contractor lacks. This test goes beyond any test previously used because it gives weight to social conditions at the workplace as well as the economic dependence of the worker on the work in question. It would consider the relationships between the alleged independent contractor and the party sued, rather than relying on a long list of factors, with a predominant factor of control.

According to this proposed test, typically, an independent contractor would have his or her own business with an objective different from the regular business of the company with whom it contracts to provide services or goods. An independent contractor would likely have contracts to work for more than one business and would lack an ongoing relationship with the business with whom it contracts. While it may enter into a series of contracts to perform services for a particular business, these contracts regularly provide a service or produce a product in which the independent contractor has expertise that is lacking by the business with whom it contracts. The independent contractor may also have a physical distance from the business. Often, it performs the services in a location that is remote from the business with little or no supervision by the business with whom it contracts. Furthermore, there is normally a social distance that the independent contractor and its employees will experience from the business with which it contracts; it will not enter into the same social relationships with the employees of the business and has less of a social connection than normally made by “employees” working at the same workplace.

An employee, in contrast, forms a social network of “trust, solidarity

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279. *Id.* at 266.

280. Independent contractors are protected from discrimination on the basis of race under 42 U.S.C. § 1981 (2000).

and affection.”<sup>281</sup> These bonds, which I refer to as “connection” to the institution, create an increased vulnerability to the effects—both economic and dignitary—of discrimination. An employee who is more connected will find discrimination more difficult both economically and socially than an unconnected independent contractor. As defined here, an independent contractor most likely has other sources of income that make his or her separation from the contract less economically devastating. Moreover, the independent contractor’s lack of social and emotional connection presupposes a disengagement from the enterprise and its personnel. While the disengagement would not necessarily prevent discrimination, it would make an independent contractor and its employees less vulnerable to the effects of discrimination because the independent contractor is not as socially or economically dependent upon the employer as an employee would be. An independent contractor may still be vulnerable to discrimination that would otherwise be illegal if he were an employee, but any discrimination against the independent contractor would likely have a less negative effect on the independent contractor than it would have on an employee.<sup>282</sup>

While the common-law control test currently used to distinguish independent contractors from “employees” measures to some extent the connection with and dependence on the institution, it is a rough measure, focusing only on one factor that may or may not sufficiently demonstrate the economic and/or social vulnerability of the worker to discrimination.

## 2. *Partners: Exclusions Based on Economic, Social, and Political Power*

As with independent contractors, most courts and commentators also agree that the anti-discrimination laws ordinarily do not cover partners.<sup>283</sup> The theory underlying this conclusion is that partners are owners of the business and therefore cannot be “employees.” Implicit is the assumption that owners have sufficient power to avoid discrimination. This conclusion has some intellectual appeal, but it suffers upon analysis.

By virtue of their membership in the partnership, partners are connected to the enterprise in a way that independent contractors are not. Thus, a singular focus on connectedness and dependence will not distinguish between those partners who are “employees” and those who are not. While a partner’s connection to the firm alone is insufficient to prove that he or she is an “employee,” the connection is relevant because the connection will make it more difficult to extricate him or herself from

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281. See Cynthia L. Estlund, *Working Together, the Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 8 (2000).

282. Of course, if all employers refused to deal with the independent contractor because of her sex or other protected characteristic, the conclusion that an independent contractor is less vulnerable to the effects of discrimination would be undermined. 42 U.S.C. § 1981 prohibits discrimination in private contracting based on race; however, it does not reach sex.

283. See e.g., 1 LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 4.03 (2003).

the partnership and may cause greater economic and dignitary harm if discrimination does occur. Besides connection and dependence, however, in the case of a partner, the courts should consider the power or lack thereof that the partner wields, economically, socially and politically and whether that power is sufficient to avoid discrimination. Even if the partner's power is insufficient to avoid discrimination, courts should also consider whether the partner is more like an independent contractor in that he or she is not connected or dependent on the partnership either socially or economically.

The two key issues, therefore, to determining whether a partner should be considered an employee under the anti-discrimination acts are the power the partner wields and the connection the person has with the partnership. The test for excluding a partner from coverage as an "employee" should be whether by virtue of being a partner, an individual is either: 1) powerful enough economically, socially and/or politically to avoid discrimination; and/or 2) economically and socially independent of the work conducted by the partnership as to be less vulnerable to the effects of discrimination.

Partners who are equals may be powerful enough to overcome the burdens of economic and social dependence on the partnership because they may be able to avoid discrimination. Discrimination would ordinarily occur to a person who is socially, economically and politically less powerful. Many partners, however, have insufficient power to protect themselves from discrimination.

The problem with many of the cases deciding whether a partner is an employee is that they focus only on the political power—whether a partner has a vote in major partnership decisions or sits on important committees. This is the focus of the economic realities test. Political power alone will rarely protect a partner from the possibility of discrimination. Political power gives the partner a say, but depending on how many partners there are, this power may be diluted. Furthermore, even when the partnership is relatively small, the political power a partner has in decision making may not protect her from non-economic discriminatory behavior such as a hostile work environment based on sexual or racial harassment.

The social power a partner has in the partnership will often determine who has the ability to make decisions or influence others' votes or, perhaps even more importantly, to create the firm's environment. One example of social power is noted by sociologist, Dr. Patricia Yancey Martin in *"Said and Done" vs. "Saying and Doing": Gendering Practices, Practicing Gender at Work*.<sup>284</sup> Dr. Martin discusses her field work in organizational behavior, which focuses on gender practices and how men and women "practice gender." Dr. Martin notes that power plays a role in this dynamic. Because some persons at work have more power, those

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284. See Martin, *supra* note 268.

persons can often admit or deny that gender is being practiced.<sup>285</sup> According to Dr. Martin, “[p]owerful men can deny that their behavior is gendered and women often cannot challenge them. Denial does not erase the harm women experience from excluding them, making them feel out of place, or requiring them to ‘act like men.’”<sup>286</sup> In fact, according to Dr. Martin, referring to men’s tendency to socialize at work and exclude women, men’s superior power permits men to define what they do as work, even though women would define it as “behaving like men.”<sup>287</sup>

Finally, the economic power a partner wields will often affect his or her ability to control himself and others at work. For example, in a law firm, the partner who brings in the most income will likely have a great deal more power than the partner who brings in little or no income. Much has been written about the difficulty white women and persons of color experience in mainstream law firms because they lack the connections or the personal characteristics to compete with white males to bring in business.<sup>288</sup> The law should analyze all of these aspects of power to determine whether a partner is someone whose power immunizes him or her from discrimination.

Even if the partner is not immune from discrimination in the partnership itself, the partner, like an independent contractor, may have little economic or social dependence on the partnership and would, therefore, like an independent contractor, suffer less from the discrimination. Under these circumstances, the law could decide not to protect the partner because he or she is not an “employee” of the partnership. This lack of economic and/or social dependence would occur if the partner worked for a number of enterprises other than the partnership, and worked away from property owned by the partnership. But, if the partner demonstrates dependence and connection, combined with a lack of economic, social or political power, he or she is vulnerable to discrimination and its effects and should be protected by the anti-discrimination acts. This dependence and connection would normally occur if the work of the partner is the same as that of the partnership and the partner does not work for any other organization. Thus, the partner would be economically dependent upon the organization in a way that an independent contractor, under my definition, is not. The partner, unlike the independent contractor, often performs the work of the partnership in a physical locality

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285. *Id.* at 357.

286. *Id.*

287. *Id.*; see also Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. OF SOC. ISSUES 637, 652 (2001) (attributing the “glass ceiling” to “performance expectations and legitimacy reactions created by gender status beliefs [that] create multiple, nearly invisible nets of comparative devaluation that catch women as they push forward to achieve positions of leadership and authority and slow them down compared to men”).

288. See Jennifer L. Pierce, *‘Not Qualified?’ or ‘Not Committed?’ A Raced and Gendered Organizational Logic in Law Firms*, in AN INTRODUCTION TO LAW AND SOC. THEORY 158-59 (Reza Bankakar & Max Travers, eds.) (2002); see also PIERCE, *supra* note 268, at 109-12.

owned by the partnership and at the time when other partners are also performing their work. The work often will be the main work of the partnership. The partner is often emotionally or socially dependent upon the partnership to some extent just by virtue of the fact that he or she is working at the partnership with partners on a regular basis.

With these analytical tools in mind—independence or connection, social, economic and political power—we should next explore the EEOC standards adopted by the Supreme Court in *Clackamas* to decide whether they successfully distinguish employees from workers who are not vulnerable to discrimination and/or its effects because of their power in the partnership or independence from the partnership.

#### E. CRITIQUE OF EEOC GUIDANCE: INADEQUATE MEASURES OF POWER AND CONNECTION

The EEOC standards are a combination of the traditional standards for distinguishing independent contractors from employees and those determining whether an individual should be treated as a partner, rather than an “employee.” As mentioned above, my thesis is that the EEOC factors for determining whether a partner, shareholder, member, or director should consider economic dependence or independence on the organization, connection to the institution or lack of connection, economic, social and political power in the institution or a lack of power.

##### 1. *Standard 1. “Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work”*

The underlying idea in this standard is that a person who is capable of being hired or fired or whose work is controlled or regulated by the organization is more likely an “employee.” The converse that is implied is that if the organization cannot hire or fire the individual or set rules or regulations governing the individual’s work, then the individual is not likely an “employee.” The setting of rules or regulations seems to go to the question of control in both senses: whether the person has the sufficient connection in physical space and in time with the institution and whether the person lacks the power to set his or her own rules and regulations. This standard does not seem relevant in the setting of a higher level professional worker. It is unlikely that the professional organization will set “rules and regulations” concerning the worker’s work habits. The failure to do so, however, does not indicate that the individual is substantially disconnected from the institution or sufficiently powerful to avoid discrimination and its effects.

##### 2. *Standard 2. “Whether and, if so, to what extent the organization supervises the individual’s work”*

Supervision of work might indicate that the person is not in business for himself or herself, and, therefore, is likely not an independent con-



tractor. This concept relates to the issue of connectedness, and conceivable powerlessness in the institution. If the organization provides little supervision of the work, one could argue in the partnership context that each partner is an independent contractor of the partnership. Lack of supervision could mean lack of control and lack of connection. But a partnership normally has connection even absent the day-to-day control or supervision over each other's work. Generally, there is control by the partnership. Like Standard One, this standard of supervision may not be relevant in the context of high level professionals.<sup>289</sup> A doctor, who operates in a professional corporation, will likely not report to a particular supervisor, but the organization may well have certain control over the doctor. This control should create incentives in the doctor to practice in a careful and appropriate manner.

3. *Standard 3. "Whether the individual reports to someone higher in the organization"*

Once again this standard, similar to supervision, seems to be a control question but one geared toward power as well. Partners might not report to one particular person within the organization, but might report to each other and/or the partnership. The partners, for example, may not report on every deposition they have taken or on each suture stitched, but there should be some oversight in a partnership, as well as in a professional corporation. The reason for the oversight is that in a professional corporation and in a partnership, the partners and shareholders will be liable for the malpractice of the other partners, and/or shareholders. This liability should create an interest in practicing in a manner that is responsible, ethical, and careful.

4. *Standard 4. "Whether and, if so, to what extent the individual is able to influence the organization"*

This may be the most important consideration in the partnership context if courts interpret it to require evaluation of the economic, social, and political power that the individual has in the organization. If this standard is interpreted merely to diagnose the amount of political power an individual has, it underestimates the dynamics in the organization and will lead to a narrower classification of "employee." Whether an individual has a vote, even if not delegated to a committee, depending on the size of the partnership, is not necessarily determinative of whether the person has the power to avoid discrimination.<sup>290</sup> The courts can realize the purposes of the anti-discrimination laws by interpreting this standard to grant permission to investigate all of the power relationships in the partnership, including the economic, social, and political power.

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289. See generally Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

290. See discussion *supra* Part IV.C.

5. *Standard 5. "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts"*

This standard should play a very small role in determining whether a partner is an "employee" or not. If a partner is vulnerable to discrimination and its effects, he or she should not be able to waive rights to the law's protections in advance.<sup>291</sup>

6. *Standard 6. "Whether the individual shares in the profits, losses, and liabilities of the organization."*<sup>292</sup>

This test is traditionally used to determine whether one is an "owner" or "employer." This test, however, should not be very important in determining whether a partner is an "employee." One can share in both the profits and the liabilities of a partnership and still be vulnerable to discrimination because of a lack of economic, social, or political power. Making this the distinguishing feature between an employee and a non-employee is unrealistic for another reason: there are persons who the law acknowledges are employees but who have significant ownership interests in the company.

A share in losses and liabilities alone is also insufficient to demonstrate whether a person is powerful enough in the organization economically, socially, or politically to avoid discrimination. Judge Posner recognized this in *Sidley Austin*.<sup>293</sup> In fact, responsibility for debts absent influence in the organization could actually show the reverse: a lack of power.

Furthermore, using this standard to distinguish an employee from a non-employee may unrealistically affect a privately held corporation. The courts have assumed that privately held corporations have employees. If these "employees" share in the profits and debts, however, this standard might wrongfully suggest that they cannot sue under the anti-discrimination statutes.

## V. PROPOSED SOLUTIONS

There are two possible solutions to the conundrum of defining "employees" in partnerships, professional corporations, and other business forms: legislative reform and broad judicial interpretation.

### A. LEGISLATIVE REFORM

The best solution would be an amendment to Title VII, the ADEA, and the ADA establishing a category of "employee" including partners of general or limited liability partnerships, shareholders and members of professional corporations, and directors and shareholders of corporations

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291. For a more complete discussion on waiver of substantive rights by contract, see discussion *supra* Part IV.B.4.

292. See *Clackamas Gastroenterology Assocs. v. Wells*, 123 S. Ct. 1673, 1680 (2003) (quoting EEOC COMPLIANCE MANUAL § 605:0009 (2000)).

293. See *EEOC v. Sidley Austin*, 315 F.3d 696, 704 (7th Cir. 2002).

and members of limited liability companies whose regular business is to perform services for the entity employer.

Unlike other category of employees, this category would create a rebuttable presumption that these individuals are "employees" as defined by the statute. The employer could successfully rebut the presumption of "employee" status by proving by a preponderance of the evidence that the partner is sufficiently economically, socially and/or politically powerful within the firm to avoid discrimination and its effects or that the individual is economically and/or socially independent of the employer as to not be vulnerable to the effects of discrimination.

This amendment balances the concerns of the employer against those of the individual partners or shareholders. It would be fairly easy for the employer to rebut the presumption in a very small partnership where the partner alleging employee status owned a majority share or where the partner's connection to the partnership is so attenuated as to diminish the effects of discriminatory treatment.

## B. JUDICIAL INTERPRETATION

The second solution, in absence of a statutory amendment, is for courts to interpret *Clackamas* to grant the courts considerable discretion in determining which partners<sup>294</sup> and shareholders are "employees." A court would rely principally on the EEOC Standard Four, interpreting the standard functionally to require a factual inquiry into the economic, social, and political power the partner wields or does not wield within the organization. This factual inquiry would ordinarily be a question of fact for the jury to decide unless, applying the standard for summary judgment, no reasonable jury could conclude either that the partner was not an "employee" or that the partner was an "employee."

The fact finder should consider whether the individual contributes substantially to the income of the organization, whether the individual has a vote on all matters, the size of the organization and whether the individ-

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294. RUPA establishes a duty of care from one partner to the partnership. It does not permit, however, a total negation of the individual partner's liability based on the duty of care.

While not yet decided by the Supreme Court, most courts of appeal considering the question of individual liability for violations of the anti-discrimination laws have held that the employer-organization, not the individual involved in perpetrating the discrimination, should be liable to the discriminatee. See *supra* note 179. Thus, if the anti-discrimination statutes were amended to define most partners as "employees" if a partner-employee sued the partnership for discrimination against her, the partnership as a whole would be liable for the damages resulting from the discrimination, if proved, even if only one of the partners were responsible for the actions leading up to the lawsuit. Because partners in general partnerships are jointly and severally liable for the debts of the partnership, however, each individual partner would be liable for the costs of discrimination. If a partner sues as an "employee" the curious result would be that the plaintiff as a partner would presumably be jointly and severally liable for the judgment as well. While this may be an odd result and depending on the size of the partnership may well leave the plaintiff to absorb the loss caused by the discrimination, a plaintiff considering a lawsuit for discrimination would likely be aware if his or her partners were judgment proof and unable to pay the judgment. This plaintiff would be advised not to proceed with the lawsuit.

ual's vote is diluted, and whether the individual exercises social power in the workforce, influencing the dynamics of the organization. The answer to these questions should guide the fact finder's conclusion on the ultimate question of whether the plaintiff's role in the organization is not sufficiently powerful to avoid both economic and dignitary harms resulting from discrimination.

The fact finder should also consider the connection the individual has to the organization. If the plaintiff is sufficiently connected to the organization, economically dependent on the organization, and working with other partners in the organization on a common goal, then, assuming that the plaintiff does not wield sufficient power to avoid discrimination, the plaintiff should be considered an "employee."

If the plaintiff does not have sufficient power to avoid discrimination, but is sufficiently disconnected from the organization that the plaintiff is not vulnerable to the effects of discrimination, either socially or economically, the plaintiff should not be classified as an employee. This lack of connection would ordinarily occur where the partner does not work on the premises with the other partners and perhaps works in other partnerships as well. Where a partner regularly works for the partnership which is a substantial source of income for the partner, the partner should be deemed to have a sufficient connection with and dependence on the partnership to meet the second prong of the test.

The difference between this proposal and the legislative amendment is procedural. If Congress overrules *Clackamas*, I propose above that it establish a rebuttable presumption that a partner is an "employee" under the acts, subject to a defendant's proof by a preponderance of the evidence that the partner either has sufficient power to avoid discrimination or is sufficiently disconnected from the firm to suffer the harms of discrimination. If, however, Congress does not overturn *Clackamas*, the courts would be free to use the same substantive test I have prepared, but consistent with previous law, the burden of proof would fall on the plaintiff to establish both prongs of the test in order to be considered an employee.

## VI. CONCLUSION: POWER AND CONNECTION TO DETERMINE STATUS

The Supreme Court in *Clackamas* built its decision on two erroneous assumptions. First, the Court assumed that partners ordinarily are not "employees" of the partnership under the anti-discrimination acts. Actually, the opposite assumption would be more accurate for many partnerships. Second, the Court assumed that an individual cannot simultaneously be an "employer" and "employee" for anti-discrimination law purposes. These errors led to the adoption of the EEOC standards which focus primarily and with little reflection on the control that the employer has over the individual to determine whether partners, shareholders, directors and members of professional corporation are "employees." This

result unduly narrows the coverage of the anti-discrimination acts not only of the individual partners and shareholders, but also, in small firms, of other employees working in the firm where the failure to count partners and shareholders means that the employer does not qualify as a statutory employer.

To determine whether a partner or shareholder is an "employee" of the partnership or professional corporation, the courts should examine the economic, social, and political power the partner or shareholder wields as well as the connection the individual has to the enterprise. If the partner is powerful enough to avoid discrimination—both tangible and hostile work environment—he or she is not an employee. If the partner lacks power to avoid discrimination, he or she is an employee unless he lacks the economic or social connectedness to the institution.

Congress can most effectively cure this error by amending the statute. A less effective, but nonetheless very useful second choice would be for courts to adopt a broad interpretation of the term "employee" pursuant to the functional approach approved of in *Clackamas*, thus enabling more coverage for partners, shareholders, and employees who seek redress for discrimination under the federal anti-discrimination acts. This interpretation would rely primarily on EEOC Standard Four, focusing on not only the political power but also the economic and social power or powerlessness of the individual and his or her connection to the institution.